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A TREATISE

ON THE LAW OF

CARRIERS OF PASSENGERS

IN TWO VOLUMES

VOL. II.

BY

NORMAN FETTER

Author of a Handbook on "Equity Jurisprudence"

ST. PAUL, MINN.

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§ 340. MASTER'S LIABILITY FOR SERVANT'S TORTS.

A master is responsible for the torts of his servant or agent committed in the course of his employment.

This rule runs through the whole subject of torts, and is of almost constant occurrence in every division of it. In the leading modern English case on the subject, the rule is thus stated: "The master is responsible for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." [1] Equally clear is the enunciation of the rule by the supreme court of the United States: [2] "The rule of respondeat superior, or

§ 340. [1] Willes, J., in Barwick v. Bank (1867) L. R. 2 Exch. 259, 265.

[2] Philadelphia & R. R. Co. v. Derby, 14 How. 468. A principal is civilly liable for the wrongful or negligent act of his agent in the

that the master shall be civilly liable for the tortious acts of servants, is of universal application, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or, even if he disapproved or forbade it, he is equally liable, if the act be done in the course of the master's employment."

§ 341. HISTORY AND REASON OF THE RULE.

The history of this rule has been traced back to the earliest times of jurisprudence. Mr. Justice Holmes, in his History of the Common Law,[1] points out that, in the earlier history of barbaric races, vengeance is the groundwork of legal procedure. If a man was

course of his employment. Brown v. Railroad Co., 66 Mo. 588. A question as to the conflict of laws on this subject arose in a Louisiana case. It was held that though the law of Mexico, where a voyage is begun, exempts the owner of a vessel from liability for the tortious acts of the captain and crew, yet the law of Louisiana, where the voyage ends, will control, and by the law of Louisiana the vessel owners are liable. Keene v. Lizardi, 5 La. 431.

§ 341. [1] Chapter 1. "Early Forms of Liability." "The primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants. * * * In later Germanic times, the master could exonerate himself by surrendering the offending person and at the same time taking an exculpatory oath. * * * On English soil, in early Anglo-Norman period, this idea of responsibility appears in the shape of exoneration for deeds of the servant not commanded nor consented to; had hardly begun to be applied to responsibility in what we now term its civil aspect; and, while common in penal matters, was by no means fixed in its scope." Mr. J. H. Wigmore in 7 Harv. Law Rev. 383. See, also, Jagg. Torts, 247 et seq.

injured by a slave or an animal or even an inanimate thing owned by another, the injured person could compel the surrender of the slave, the animal, or the thing, so that he could wreak his vengeance on him or it. Gradually the owner of the offending property obtained the right, if he chose, of paying the damages sustained by the injured person, instead of surrendering the property, and thus the vengeance was bought off. Still later, as the community became more civilized, the right of vengeance was altogether lost, and the liability to pay damages remained, and was extended to the acts of free servants as well as of slaves.

At an early date in the history of English jurisprudence, however, the courts broke away from the doctrine of the universal responsibility for the acts of servants, and recognized the doctrine of particular command as the test of the master's liability; or, in other words, the master was held responsible only when the conduct of the servant had been explicitly commanded by him.[2] Gradually, this test of the mas-

[2] This period is treated as beginning about in 1300. It continued to be applied in all its strictness until about Lord Holt's time, in 1700. Mr. Wigmore, in 7 Harv. Law Rev. 383. Liability for implied command was added at about that time. Blackstone states the rule as follows: "As for those things which the servant may do on behalf of the master, they seem all to proceed on this principle: that the master is answerable for the act of his servant if done by his express command, either expressly given or implied,—'Nam qui facit per alium facit per se.' Therefore, if a servant commit a trespass by the command or encouragement of the master, the master shall be guilty of it. * * * In the same manner, however, what a servant is permitted to do in the usual course of his business is equivalent to a general command." 1 Bl. Comm. 429.

ter's liability was supplanted by the test of the scope of the servant's authority. If the servant commits a tort while acting within the scope of his authority, the master is liable, though the tort is unauthorized or forbidden by the master.[3] This test, in its turn, is now being supplanted by the test of the course of employment. This principle is thus stated by Mr. Austin Abbott: "The principle now recognized is that, while the employé is acting in the course of employment, the employer is liable, even though the act was without the scope of employment,—that is to say, unauthorized; and a number of cases go so far as to hold (and, it seems, justly) that if it was done in the apparent course of employment, and with the implements and facilities of the employer's place and premises, the employer is liable, notwithstanding the act may have been in a service not stipulated for by the contract of employment, or during hours when the contract of employment did not require any service. In other words, the liability of the principal is not, as in cases of agency, tested by the scope of employment, but by the course of service." [4]

The courts have thus, in a large measure, retraced their steps to the primitive Germanic notion of the master's absolute liability for the servant's torts. Indeed, as we shall hereafter see, it is scarcely too broad a statement of the law to say that a common carrier is absolutely liable to passengers for the torts of his

[3] This test is said to have been adopted early in the present century. 1 Jagg. Torts, 252.

[4] Note to Mallach v. Ridley, 24 Abb. N. C. 172, 9 N. Y. Supp. 922.

servants, without regard to the question whether or not the servant is acting within the scope of his authority or in the course of his employment.[5]

The commonly accepted reason for the rule as it now obtains is thus stated by Chief Justice Shaw of Massachusetts: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself, his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." [6] "I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard for the safety of others." [7]

However, the fact that servants, as a class, are financially irresponsible, and are unable to respond in damages to persons injured by them while about their master's business, must have been a very powerful, though a silent, element in the development of the law on this subject. Certainly, it is very doubtful whether masters or employers would be liable to-day to the same

[5] See, post, § 365.

[6] Farwell v. Railroad Corp., 4 Metc. (Mass.) 49. "The foundation of the rule on this subject is that the agent is but the instrument; that one having authority over the actions of another, who, for his own benefit, places him in condition to injure others, by the exercise of the powers conferred, shall be responsible for the abuse of that power by his agent, as if it were the act of himself, whether such abuse be the result of negligence or willfulness." New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 276.

[7] Pol. Torts, 89.

extent for the torts of their servants if these servants, as a class, were able to respond in damages to the injured person.

§ 342. NO DISTINCTION BETWEEN CORPORATIONS AND INDIVIDUALS.

A corporation is responsible for the torts of its servants to the same extent and in the same manner as a natural person is. A great deal of difficulty originally felt in holding corporations liable for the acts of their agents within the scope of their authority arose from the supposition that it was necessary that their appointments should be under the seal of their principals. The decisions both in England and America have satisfactorily disposed of this technical doubt, and it is now clearly the law that no such evidence of authority is required.[1]

It has also been contended, as a corporation has no lawful authority to order an unlawful act to be done, or to order a lawful act to be done in an improper way, or so that it shall violate the rights of others, that, whenever such is the case, it becomes the act of the agent, and not of the corporation.[2] But this reasoning, though specious, did not bear the test of prac-

§ 342. [1] Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 369. If a servant of a railway company commits an assault by authority of the company, an action for assault and battery may be maintained against it, and it is not necessary that the servant should be authorized to do the act by an instrument under seal. Eastern Counties Ry. Co. v. Broom (1851) 6 Exch. 314.

[2] In Orr v. Bank, 1 Ham. (Ohio) 36, it was held that a corporation is not liable for an assault because it has no personal existence, and can neither beat nor be beaten.

tical application. Under it, a corporation could never be held liable for an affirmative act; for, whenever such affirmative act is a violation of the right of another, the ready and unvariable answer would be that, because such act was wrongful, it was therefore unlawful, and not authorized by its charter, and hence not the act of the corporation, but the individual act of those who represent it and exercise its functions. The result in all cases would be this: If the act was rightful and lawful, then it is the company's; but if it was wrong, and not legally justifiable, then it is not the act of the company, which would be a stranger to it.[3]

In regard to passenger carrying corporations, some of the courts have gone so far as to lay down this principle: The train hands in charge of a railroad train, as to passengers in transitu, should be regarded as the corporation itself; and it is therefore as responsible for their acts in the conduct of the train and the treatment of the passengers as the train hands would be for themselves if they were the owners of it.[4]

[3] St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 374; Illinois Cent. R. Co. v. Read, 37 Ill. 485. An action for malicious prosecution will lie against a corporation. Edwards v. Railway Co. (1880) 6 Q. B. Div. 287, overruling Stevens v. Railway Co., 10 Exch. 352, where Baron Alderson said that, in order to support the action, it must be shown that defendant was actuated by a motive in his mind, and that a corporation has no mind.

[4] Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530. In Bass v. Railway Co., 36 Wis. 450, it was said: "Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort in transitu,

§ 343. WHO ARE SERVANTS.

A servant is one who is under the orders and control of another, not only as to the end of the work, but also as to the means and methods used to attain that end.

Since the master's liability for the acts of his servant can exist only if and when the relation of master and servant exists, it becomes of great importance to have a definite test by which to determine the existence of the relationship. Ordinarily, it is regarded that the test of the relationship is "whether the defendant retained the power of controlling the work." [1] "The relation of master and servant exists only between persons

under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, pro hac vice, are vested in these officers; and that, as to passengers on board, they are to be considered as the corporation itself, and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers, the corporation being responsible for the acts of the officers, in the conduct and government of the train, to the passenger traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by the great weight of authority." This principle, so far as passengers are concerned, completes the swing back to the primitive Germanic doctrine that the master is absolutely responsible for all the acts of his servant. See, also, post, § 365.

§ 343. [1] 1 Jagg. Torts, 229; Fulton County St. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649–657; Painter v. Mayor of Pittsburg, 46 Pa. St. 213; Singer Manuf'g Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32.

of whom one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work.' He who does work on these terms is, in law, a servant, for whose acts, neglects, and defaults, to the extent to be specified, the master is liable. * * * The power of controlling the work, which is the legal criterion of the relation of a master to a servant, does not necessarily mean a present and physical ability. Shipowners are answerable for the acts of the master, though done under circumstances in which it is impossible to communicate with the owners. It is enough that the servant is bound to obey the master's directions if and when communicated to him." [2]

As a general rule, the relation of master and servant continues, not only while the servant is actually engaged in his duties as such, but also while he is on the master's premises, going to and from his work. Thus, a driver of a horse car who, on being relieved by another driver, immediately leaves the car, is, while so leaving, still in the employ of the company; and it is responsible for his negligence and carelessness in knocking a passenger off the car while so leaving.[3]

[2] Pol. Torts, 91, 96. The owner of a tug, who retains entire control of the crew, is liable for an injury to a passenger caused by the negligence of the crew, though the tug was leased to a ferryman, and though the passenger paid his fare to the ferryman. Dalyell v. Tyrer, El., Bl. & El. 899.

[3] Com. v. Brockton St. Ry. Co., 143 Mass. 501, 10 N. E. 506.

§ 344. SAME—INDEPENDENT CONTRACTORS.

An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. A person employing an independent contractor is not generally responsible for the latter's wrongful acts, or those of a subcontractor or servant of either.[1] Thus, it has been held that where trains are run by a construction contractor over a part of the road not turned over to the railroad company, and the profits derived are retained by the contractor, and no portion thereof is paid to the company, the company is not liable for injuries to a passenger on a train so operated,[2] even though it owns the train.[3] So, a stevedore under a contract to load or unload a ship is an independent contractor, for whose negligence the ship is not liable.[4]

But one who is employed by the owners of a street railroad, by the month, to run a car owned by the company over the road once each day,—the possession and the right to possession of the railway plant remaining in the railway people,—is not an independent contractor, but a servant of the railway company, for whose acts and that of his servant running the car the railway people are liable.[5] So, where a train is run

§ 344. [1] 1 Jagg. Torts, 228, 231.

[2] Cunningham v. Railroad Co., 51 Tex. 503; Union Pac. R. Co. v. Hause, 1 Wyo. 26.

[3] Scarborough v. Railroad Co., 94 Ala. 497, 10 South. 316.

[4] Linton v. Smith, 8 Gray (Mass.) 147.

[5] Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906.

by a railroad company with its own employés over a newly-constructed road owned by it, but not yet turned over to it by the contractor, the company is responsible for injuries inflicted through the negligence of its employés operating the train, even though the contractors had the right to determine when, where, and to what extent supplies should be transported, and to that extent had control of the company's train and its employés.[6]

To the principle that one is not liable for the acts of an independent contractor, there are several well-recognized exceptions. Chief among them is this: One who is bound to perform a duty, or who is held to a certain standard of conduct, intrusts the performance of that duty to another at his peril; and he is liable for that other's negligence, whether that other is an independent contractor or a servant.[7] On this principle, we have seen that a carrier is responsible to a passenger injured by the negligence of an independent contractor in the construction of the roadbed.[8] So, a ferry company is responsible for the act of an independent contractor, making repairs on its premises, in placing a log at the threshold of the gate, over which a passenger stumbles in the dark.[9] So, where an incompleted railroad, in the possession of a con-

[6] Burton v. Railway Co., 61 Tex. 526.

[7] Jagg. Torts, 234, and cases cited.

[8] See ante, § 30.

[9] Osborn v. Ferry Co., 53 Barb. (N. Y.) 629. In bringing passenger's baggage on board, and placing it in the steerage berth compartment when requested by the passenger, a stevedore is not exercising an independent employment, but is performing a duty for the passenger which rests on the ship; and, where a person lawfully on board

struction company, is used by that company for purposes of general traffic, the railroad company which owns the road is liable for the death of a passenger killed by the negligence of the employés of the construction company while transporting him, whether the use of the road by the construction company was with the consent of the railroad company or not. It was said: "In such a case, as regards the public, those who operate the road must be regarded as the agents of the corporation. This doctrine is in accordance with sound public policy; for it would certainly be against the public interest to allow a corporation, invested by the state with important franchises and privileges, and incorporated to discharge a public duty as well as to subserve a private benefit, to shirk its responsibilities, or shift its duties and liabilities to other, perhaps irresponsible, parties. Except as authorized by statute, it cannot relieve itself from responsibility for the exercise of its corporate powers and franchises." [10] So, a street-railroad company is liable for injuries to a passenger while the road is operated by a construction company under a contract requiring it to operate the road satisfactorily for at least 10 days before it can require payment for the equipment.[11]

is injured by the negligence of the stevedore's employés in handling a trunk, the ship is liable. The Dresden, 62 Fed. 438.

[10] Lakin v. Railroad Co., 13 Or. 436, 11 Pac. 68. This case is in conflict with those cited in notes 2 and 3 of this section. It would seem that a railroad company ought not to be held responsible for the act of a construction contractor in carrying passengers without its consent, since this is entirely outside the scope and course of the contractor's employment, viz. the construction of the roadbed.

[11] Cogswell v. Railroad Co., 5 Wash. 46, 31 Pac. 411.

§ 345. SAME—PHYSICIANS AND SURGEONS.

A surgeon employed on a steamship to attend on passengers, whether employed voluntarily by the vessel owners or under a statutory command, is not a servant of the vessel owners, for whose negligence they are liable. The vessel owner performs his duty when he employs a competent physician duly qualified as required by law. He is not compelled to select and employ the highest skill and the longest experience, but all that is required is the selection of a person reasonably competent. If the physician is thus qualified, his negligence in the treatment of a particular case is not chargeable to the vessel owners. The work which the physician does after the vessel starts on the voyage is his, and not the shipowners'. It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or not, as they choose. They may place themselves under his care, or go without attendance, as they prefer; and they determine themselves how far and to what extent they will submit to his treatment. The captain of the ship cannot interfere. The physician is not the shipowner's servant, doing his work, and subject to his direction. In his department, in the care and attendance of the sick passenger, he is independent of all superior authority except that of his patient, and the captain has no power to interfere except at the passenger's request.[1] The same principle applies where a

§ 345. [1] Allan v. Steamship Co., 132 N. Y. 91, 30 N. E. 482, reversing 55 Hun, 803, 8 N. Y. Supp. 803; Laubheim v. Steamship Co., 107

railroad company undertakes to furnish a surgeon to attend on an injured person. If the physician selected is a competent man, reasonably fitted for the duties he is called on to perform, the company is not liable for his negligence in a particular case.[2]

§ 346. SAME—PILOTS.

In England it is held that a compulsory pilot, who is in charge of the vessel independently of the owner's will, and, so far from being bound to obey the owner's or master's orders, supersedes the master for the time being, is not the owner's servant, and the owner is not liable for his negligence in navigating the vessel.[1] But this rule does not prevail in the United States. It is held that the owners are liable for the negligence of a pilot in navigating a ship, even though he is appointed by public agencies, and the master has no voice in his selection.[2] So, it has been held that the fact that the selection of a pilot for a river steamer is limited

N. Y. 228, 13 N. E. 781, affirming 51 N. Y. Super. Ct. 467; O'Brien v. Steamship Co., 154 Mass. 272, 28 N. E. 266. If the surgeon of a foreign steamship, bringing immigrants to a port of this country where the quarantine regulations require vaccination as a prerequisite of landing, vaccinates one of them, whose behavior indicates consent on her part, whatever her unexpressed feelings may be, he is justified in his act, and the shipowner is not liable therefor as for an assault. O'Brien v. Steamship Co., 154 Mass. 272, 28 N. E. 266.

[2] Secord v. Railway Co., 18 Fed. 221.

§ 346. [1] Carruthers v. Sydebotham, 4 Maule & S. 77; The Protector, 1 W. Rob. Adm. 45; The Maria, Id. 95. This rule has been enacted into a statute (Merchant Shipping Act 1854, § 388), which is stated to be in affirmance of the common law. The Halley (1868) L. R. 2 P. C. 201.

[2] The China, 7 Wall. 53, 67; Yates v. Brown, 8 Pick. (Mass.) 23.

by law to those who have been found, by examination, to possess the requisite knowledge and skill, and have been licensed by government inspectors, does not change the relation of employer and employé between the vessel owner and the pilot, nor exempt the master from liability for the negligence of the pilot.[3]

§ 347. SAME—DOUBLE EMPLOYMENT.

One who is habitually the servant of A. may become, for a certain time, and for the purpose of certain work, the servant of B.; and this, although the hand to pay him is still A.'s.[1] Thus, the persons in charge of a drawing-room car are to be regarded and treated, in respect to their dealings with passengers, as the servants of the railroad company in whose train the drawing room car is run; and the railroad company is responsible for their acts to the same extent as if they were directly employed by it, though they are in fact employed by the owner of the drawing-room car. The public interest and due protection to the rights of passengers require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation.[2] So, as to passengers, the porter and other employés of a sleeping-car company are considered as the servants

[3] Sherlock v. Alling, 93 U. S. 99.

§ 347. [1] Pol. Torts, 95.

[2] Thorpe v. Railroad Co., 76 N. Y. 402, affirming 13 Hun, 70.

and employés of the railroad company, though they are employed and paid by the sleeping-car company.[3] So, where a railroad company permits a servant of a bridge company to collect fare from passengers for the bridge company, and permits such servant to control the motion of the train, such servant must also, while so employed, be considered the servant of the railroad company, and the latter is liable for his acts in wrongfully ejecting a passenger from the train.[4]

But a postal clerk, in the employ of the federal government, running on a train, is not an employé of the railroad company, so as to charge it with liability to passengers for his negligent or wrongful acts. The railroad company has nothing to do with his selection or employment, has over him no supervision or control, and has no power to discharge him.[5] Neither is a railroad company liable for the wrongful acts of an express messenger on one of its trains, employed by the express company.[6] The true distinction between post-

[3] Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. 319, reversing 45 Hun, 139; Williams v. Car Co., 40 La. Ann. 417, 3 South. 631. See, also, ante, § 213.

[4] Union Railway & Transit Co. v. Kallaher, 114 Ill. 325, 2 N. E. 77; Id., 12 Ill. App. 400. The fact that a station agent is employed by two railroad companies will not release one of them from liability for his wrongful acts within the scope of his employment. This fact only shows that both companies might have been sued, instead of one. Illinois Cent. R. Co. v. King, 69 Miss. 852, 13 South. 824.

[5] Poling v. Railroad Co., 38 W. Va. 645, 18 S. E. 782; Muster v. Railway Co., 61 Wis. 325, 21 N. W. 223. See, also, ante, § 211. As to when railroad company is liable for negligence of postal employé, in throwing mail sack from train, see ante, § 105.

[6] Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South. 933.

al clerks and express messengers, on the one hand, and employés on sleeping and drawing-room cars, on the other, lies in the fact that the duties of the latter pertain directly to passengers, while the duties of the former pertain exclusively to other matters.

A street railroad is not chargeable with the blunder of a flagman employed at a crossing by a steam railroad, resulting in a collision between a street car and a train, though it instructed its drivers to obey the signal of the flagman, where its own employés were not chargeable with negligence.[7]

§ 348. SAME—POLICE DUTIES.

An interesting question sometimes arises as to whether a railroad employé, clothed by statute with police powers, shall be regarded, while exercising such powers, as a servant of the railroad company or as a public officer. A statute which declares station agents and conductors to be peace officers, with power to make arrests, does not make them officers of the state, but merely enlarges and defines their duties as agents of the railroad companies, and the companies are liable for the acts of such employés in causing a passenger's arrest on an unfounded charge of disor-

[7] Chicago City R. Co. v. Volk, 45 Ill. 175. A lessee or licensee of the exclusive privilege of entering the cars, or upon the right of way of a railroad company, to sell or supply lunches to passengers, is not a servant or agent of the corporation, so as to render it liable for an assault committed by him on a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers. Fluker v. Banking Co., 81 Ga. 461, 8 S. E. 529.

derly conduct.[1] So, a railroad company is liable for the act of its conductor in wrongfully causing the arrest of a passenger on an unfounded charge of riding with intent to evade payment of fare, though the conductor is also a railroad police officer.[2] So, the appointment, without legal authority, of a railroad employé as a police officer, does not relieve the company from liability for his arrest of a passenger on an unfounded charge of disorderly conduct,[3] or for the supposed violation of a city ordinance prohibiting the soliciting of passengers for carriages without a license.[4]

A police officer who, in response to the invitation of the regular agent of the company, assists in ejecting a passenger, becomes a special agent of the company for that purpose; and the company is liable for the use of excessive force in accomplishing the ejection. But, if the conduct of the passenger unlawfully persisting in riding in a railroad car is such as to constitute him a disorderly person, a policeman may, by virtue of his office, arrest such disorderly character, notwithstanding that the policeman was originally called in as an agent of the company; and, for violence incident to such arrest, the company and its agents

§ 348. [1] King v. Railroad Co., 69 Miss. 245, 10 South. 42; Gillingham v. Railroad Co., 35 W. Va. 558, 14 S. E. 243; Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557.

[2] Krulevitz v. Railroad Co., 143 Mass. 228, 9 N. E. 613. The fact that an employé in a railroad yard is also a special police officer does not relieve the company from liability for his act in pulling a boy from a moving train, where he did not intend to arrest the boy. Brill v. Eddy, 115 Mo. 596, 22 S. W. 488.

[3] Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.

[4] Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329.

are not liable. And, when a city police officer takes by force a disorderly person from the scene of disorder to the police station, the act will be presumed to have been done by virtue of his official character, notwithstanding the fact that, prior to such disorderly conduct, the officer was in law the agent of the company; and, for force used in making the arrest, the company is not liable.[5]

§ 349. SAME—PERSON ASSISTING SERVANT.

Ordinarily, a person may not make another person a servant of his master.[1] But, as to carriers of passengers, the law not only contemplates the employment of competent servants, but it exacts the performance, by the servants themselves, of all duties imposed. If such a duty is performed by a third person, either at the request of the servant or with his mere assent, if it is done in his presence, and without objection by him, the act must be regarded as the act of the servant himself; and if it be negligently done, and an injury should result to a passenger on account of it, the carrier is liable. It is the duty of the servant in such employment to prevent officious intermeddling with his duties, when known to him. The fact that he did not request the intruder to perform the service ought not to excuse the master. To rule differently would

[5] Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590.

§ 349. [1] 1 Jagg. Torts, 242, citing Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Catlett v. Young, 143 Ill. 74, 32 N. E. 447; Dimmitt v. Railway Co., 40 Mo. App. 663; Glynn v. Houston, 2 Man. & G. 337; Lucas v. Mason, L. R. 10 Exch. 251.

in effect abrogate the rule governing the carrier's liability.[2] It has accordingly been held that where a person riding on a freight train has helped the train hands in the performance of their duties at various points along the route, and he undertakes to throw a switch with the assent of a brakeman whose duty it was to perform this service, the railroad company is liable for an injury to a passenger owing to the negligent manner in which such person did the service.[3] So, one who is aboard a locomotive engine, serving the company, with the knowledge and consent of the train hands, is a servant of the company, though the station agent who directed him to go and assist on the engine had no authority to hire train hands; and, if a passenger is injured by such person's negligence while serving on the locomotive, the company is liable.[4] So, where a station agent places another person in control of the ticket office, of whom an intending passenger purchases a ticket, such person must be regarded as an employé of the company, so as to render it liable for an assault committed by him on the passenger in a controversy caused by his failure to return the passenger the proper change.[5]

§ 350. SAME—EVIDENCE OF EMPLOYMENT.

Where a passenger is ejected violently from a train in motion, by a person representing himself to be a con-

[2] Dimmitt v. Railway Co., 40 Mo. App. 654.

[3] Dimmitt v. Railway Co., 40 Mo. App. 654.

[4] Lakin v. Railroad Co., 15 Or. 220, 15 Pac. 641.

[5] Fick v. Railroad Co., 68 Wis. 469, 32 N. W. 527.

ductor, and possessed of the paraphernalia of such officer at the time, and actually taking fares of other passengers, a strong presumption exists that such person was in fact the conductor, for whose act the company is liable.[1] So, evidence that the person assaulting a passenger was acting as a brakeman on the car is sufficient to warrant the jury in finding that he was so acting by the authority of defendant's agent empowered to employ brakemen.[2] So, in the absence of evidence to the contrary, the presumption is that a car in a passenger train run by defendant is its car, and the porter in charge of it is its employé.[3]

But in an action for injuries sustained in being pushed from a moving train by a negro who emerged from the car, the declaration of the negro, made just before the act, that he had charge of the train, is not sufficient to establish the relation of master and servant.[4] So, a railroad company is not liable for an assault and a robbery of a passenger as he was entering a car, where the only evidence as to who committed the crime is that he was a man carrying a lantern, with letters on it, and wearing a cap with a badge. Even

§ 350. [1] Lampkins v. Railroad Co., 42 La. Ann. 997, 8 South. 530. One who has control of a train, and exercises the authority of a conductor, may be rightfully presumed to be such, aside from his declarations on the subject. Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37, 43.

[2] Conger v. Railway Co., 45 Minn. 207, 47 N. W. 788; St. Louis, I. M. & S. Ry. Co. v. Hendricks' Adm'r, 48 Ark. 177, 2 S. W. 783; Hughes v. Railroad Co., 36 N. Y. Super. Ct. 222.

[3] Harlinger v. Railroad Co., 15 N. Y. Wkly. Dig. 392, affirmed 92 N. Y. 661.

[4] Lindsay v. Railroad Co., 46 Ga. 447.

if such person should be assumed to be a servant of the company, yet there is nothing to show that the wrongful acts were done in the course or within the scope of his employment.[5]

§ 351. TORTS COMMANDED OR RATIFIED BY MASTER.

A man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own.

"A trespasser may be not only he who does the act, but who commands or procures it to be done, who aids or assists in it, or who assents afterwards." [1]

But ratification of an unauthorized and unlawful act can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving such intention.[2] Hence the mere fact that a railroad company, after it has been sued for personal injuries, retains a servant whose negligence is alleged to have caused the injuries, is not a ratification of the alleged act, where it is denied by the servant.[3]

[5] Sachrowitz v. Railroad Co., 37 Kan. 212, 15 Pac. 242.

§ 351. [1] De Gray, C. J., in Barker v. Braham (1773) 2 W. Bl. 866; Bigelow, Lead. Cas. 235; Pol. Torts, 87.

[2] Williams v. Car Co., 40 La. Ann. 87, 3 South. 631.

[3] McGown v. Railway Co., 85 Tex. 289, 20 S. W. 80; Gulf, C. & S. F. Ry. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495; Williams v. Car Co., 40 La. Ann. 87, 3 South. 631. See, also, post, § 547.

§ 352. NEGLIGENCE OF SERVANT.

A master is responsible for the negligence of his servant while acting in the course of his employment, whether or not the servant was incompetent, or whether or not the master had knowledge of his incompetency.

The question of the master's liability for the servant's negligence does not turn on the question whether the master has been guilty of negligence in selecting or retaining the servant. The master is absolutely liable for the negligence of the servant in the performance of his duties.[1] With respect to passengers, the carrier's servants are required to exercise the highest degree of practicable care and skill in the performance of their duties; and the carrier is liable if they fall below this standard, and thereby injure a passenger.[2] Nearly

§ 352. [1] Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135; Gillenwater v. Railroad Co., 5 Ind. 339. The proprietor of a stagecoach is liable for an injury done to a passenger in consequence of the driver being intoxicated, although his reputation as a driver was until then of the highest character, and he had never been known to be intoxicated before. Bishop v. Stockton, 3 Fed. Cas. 453, affirmed in Stockton v. Bishop, 4 How. 156. As to the carrier's duty in the employment of servants, see ante, § 95.

[2] Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220. To authorize a passenger to recover for injuries, it is not necessary that the carrier's servants should have been guilty of intentional or willful negligence, and it is liable for any careless conduct of its servants resulting in injury to the passenger. Koetter v. Railway Co., 59 Hun, 623, 13 N. Y. Supp. 458, affirmed 129 N. Y. 668, 30 N. E. 65. A railroad company is responsible for the negligence of its employés in the exercise of the functions in which they are employed. Choppin v. Railroad Co., 17 La. Ann. 19.

everything contained in the first eight chapters of this work is an illustration of this proposition, and it is needless to multiply citations on this point.[3]

The only close question arising on this subject is, what acts are done in the course of employment? The answer to this question will be found in the following sections of this chapter.

§ 353. EXCESSIVE OR ERRONEOUS EXECUTION OF AUTHORITY.

The master is liable for the erroneous or excessive execution of authority conferred on him by the servant; but he is not responsible for acts outside the scope of the servant's employment.

"Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of discretion

[3] The negligence of a conductor in putting or assisting a passenger off the car is the negligence of the corporation owning or operating the road. Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365. A railway company is liable for an injury to a person on its depot platform on the way to the station to ascertain the time of departure of a train, caused by being struck by a piece of timber thrown from a car which its employés were at the time unloading. Toledo, W. & W. Ry. Co. v. Maine, 67 Ill. 298. A porter at defendant's railroad station negligently drove a truck laden with baggage, and a portmanteau fell off and injured plaintiff, who was standing on the platform, waiting to take a train of another company, which also used the station. Held, that the company employing the porter was liable for the injury, since he was guilty of negligence in the course of his employment. Tebbutt v. Railway Co., L. R. 6 Q. B. 73.

by the servant, or the use of force towards or against another, the use of such force or discretion is a part of the thing authorized, and, when exercised, becomes, as to third persons, the discretion and act of the master; and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing the master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. It is, in general, sufficient to make the master responsible, that he gave to the servant an authority, or made it his duty to act, in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of his servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts his servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the servant, through

lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances or the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury on another." [1]

But, to impose liability on the master for the wrong-

§ 353. [1] Rounds v. Railroad Co., 64 N. Y. 129, affirming 3 Hun (N. Y.) 329, 5 Thomp. & C. (N. Y.) 475. See, also, to same effect, Higgins v. Railroad Co., 46 N. Y. 23; Passenger R. Co. v. Young, 21 Ohio St. 518; Healey v. Railroad Co., 28 Ohio St. 23; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 352, 374; Indianapolis, P. & C. Ry. Co. v. Anthony, 43 Ind. 183. A railway company is liable for the malicious and criminal acts of its employés towards passengers while they are executing what they suppose to be the orders of the company, even though the orders do not in fact contemplate such acts. McKinley v. Railroad Co., 44 Iowa, 314. The conductors and employés of a railroad company, being in the line of their authority in collecting fare, or taking up tickets from passengers, represent the company, and the company is therefore liable for any abuse of their authority, whether of omission or commission. Baltimore & O. R. Co. v. Blocher, 27 Md. 277. The owner of a vessel is liable for the tortious acts of the master committed while in his service and within the scope of his employment. Block v. Bannerman, 10 La. Ann. 1. Where a clerk of a city railway company has assigned to him the general and special duty of looking for and arranging the evidence in personal injury suits against the company, the company is responsible for his act in offering money to a witness to keep him from testifying against the company, and evidence as to such act is admissible against the company. Chicago City Ry. Co. v. McMahon, 103 Ill. 485. The fact that a passenger in an omnibus is struck by a driver's whip is prima facie evidence of negligence by the driver in the course of his employment; and even if it appear that the blow was struck at the servant of a tramway car, with whom there had been a dispute, and who had jumped in the omnibus to get its number, it is a question for the jury whether the blow was struck by the driver in a private spite, or in supposed furtherance of his employer's interests. Ward v. Omnibus Co., 42 Law J. C. P. 265.

ful act of the servant, the servant must at the time be engaged about the master's business.[2] A master is not responsible for the wrongful act of his servant, unless that act be done in the execution of the authority, express or implied, given by the master. Beyond the scope of his employment, the servant is as much a stranger to the master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master.[3]

§ 354. SAME—EXPLODED RULE EXEMPTING MASTER FROM LIABILITY FOR WILLFUL TORTS OF SERVANT.

In McManus v. Crickett [1] it was held that when the servant, in performance of the master's service, by his negligent act, does an injury, the master is liable in damages; when, however, the act which produced the injury was intentionally done, although done while in the performance of his master's service, then the master is not liable, unless the master commanded the act, or was present and did not dissent from it. This case marks one of the transition periods from the earlier common-law rule holding the master liable for the torts of the servant only when done by his express command. It, however, formed the basis of many of the earlier decisions in this country. Thus, in the

[2] Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South. 933.

[3] Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Williams v. Car Co., 40 La. Ann. 87, 3 South. 631.

§ 354. [1] 1 East, 106, decided in 1800.

last case decided by the New York court of appeals under this rule, it was held that a street-car company was not liable for the act of its conductor in throwing from a street car, with great violence, a female passenger, who refused to leave it until it had come to a full stop.[2] A very good illustration of this rule is also to be found in a Pennsylvania case, where it was held that a street-car company was not liable for the willful act of its driver in striking a trespassing boy, and throwing him from the car, because no authority was conferred on him to beat and assault trespassers, but that it was liable for the driver's act in negligently driving over the boy after his eviction, because the driving was within the scope of his employment.[3]

[2] Isaacs v. Railroad Co. (1871) 47 N. Y. 122. An authority to eject a trespasser from a train in a proper manner will not be presumed to be an authority to eject a trespasser in an improper manner; and hence the act of a brakeman in forcing a trespasser from a moving train is not in performance of a duty he owes to the company, but is an act for which he alone is solely responsible. Hughes v. Railroad Co. (1873) 36 N. Y. Super. Ct. 222.

[3] Pittsburg, A. & M. P. Ry. Co. v. Donahue, 70 Pa. St. 119. Where a conductor forcibly ejects a passenger on the ground that his ticket does not entitle him to ride on the train, the company is not liable if the ticket was in fact good for that train. Allegheny Val. R. Co. v. McLain, 91 Pa. St. 442. A train of empty passenger cars was being moved a distance of two or three miles to the depot. A laborer in the employ of the company near the depot got on the platform, and sat down on the car step. He was discovered by the conductor, and ordered to jump from the moving train, and on his refusal so to do the conductor pushed him off. Held that, if the conductor had authority to put persons from moving trains, then the company would be liable, though he was careless, negligent, or reckless; but, if his act was unauthorized, willful, wanton, or malicious, the company would not be liable. Pennsylvania Co. v. Toomey, Id. 256. These

The rule, as above stated, was never fully satisfactory, and has been almost completely modified or abrogated in the United States and in England.[4] Where

cases are probably no longer law in Pennsylvania. In McClung v Dearborne (1890) 134 Pa. St. 396, 19 Atl. 698, it was said: "While not liable for the willful and independent trespass of his servant, a master is responsible civilly for the manner in which the servant does the work he is employed to do; and it is the character of the employment when an act is done, not the private instructions to the servant, by which the master's liability is to be determined." In this case it was held that where a master, claiming ownership of an organ in the possession of another, sent his servants to the house where the organ was, to take possession of it, and the servants entered and took possession of the organ by force and violence, the master was liable for their trespass, although in committing it they violated his express instructions. In Crocker v. Railroad Co., 24 Conn. 249, it was held that an order by a conductor of a train to another servant to assist in putting a passenger off authorizes the employment of none but usual and legal means for the purpose; and the intentional employment of such an unnecessary, unusual, and unjustifiable measure as a kick in the face could not have been contemplated by the conductor, and, in the absence of proof that he authorized it, the company is not liable for injuries caused thereby. The most recent case in which this rule seems to have been applied is Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, where it was held that a railroad company is not liable for the act of its engineer in backing his locomotive towards a street car crossing the track, with the intention of frightening the passengers, in consequence of which some of them, believing themselves in imminent danger of a collision, jumped from the street car and were injured. It would seem that this case is clearly in opposition to the modern rule on this subject. The engineer has certainly complete authority over the movements of his locomotive. If he had started it negligently, and frightened the passengers, the company would clearly be liable for his negligence. With still greater reason, it would seem that it ought to be liable where he purposely runs his engine so as to frighten them.

[4] In Limpus v. Omnibus Co. (1862) 32 Law J. Exch. 34, 1 Hurl. & C. 526, it was held that where the driver of an omnibus drove across

a person is injured by the act of a servant, done in the course of his employment, no good reason exists why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master.[5] The precise point of abrogation of modification of the old rule is that if the agent, while acting within the course of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured.[6]

The modification of the old rule began to be made about simultaneously with the introduction of railroads as a factor in modern commerce; and there can be no question that the courts, in breaking away from the old rules on the subject, were largely influenced by the fact that travel and transportation are monopolized by wealthy and powerful corporations, employing large armies of servants, most of them not financially able to personally respond in damages for injuries committed by them while in the performance of their du-

the road in front of a rival omnibus, which was thereby overturned, his employer was liable, although he had expressly forbidden the driver to obstruct any omnibus.

[5] Passenger R. Co. v. Young, 21 Ohio St. 518.

[6] Gilliam v. Railroad Co., 70 Ala. 268, modifying Selma, R. & D. R. Co. v. Webb, 49 Ala. 240.

ties. Then, too, as we shall hereafter see,[7] the fact that a common carrier has bound himself by contract to carry the passenger was quite an important element in the abrogation of the old rules. Thus, in a comparatively early New York case, it was held that a railroad company is not excused for its failure to carry a passenger to destination with reasonable diligence by the fact that the delay was caused by the willful and intentional act of its conductor.[8] In this connection, it is worth noting that even before the introduction of railroads it was enacted by statute in some of the states that the owner of every carriage or vehicle conveying passengers for hire is liable for all injuries done by the driver, whenever the driver is liable therefor, whether the injuries be caused by negligence or willfulness.[9]

§ 355. SAME—MISCONDUCT AT STATIONS.

The true test by which to determine the liability of the employer or master for the negligent or wrongful acts of the servant is, was the wrongful or negligent act done in the course or scope of the servant's employment? If it was, the employer is liable. Hence a railroad company is liable for the act of a station agent in using excessive force in the removal of a person who

[7] See post, § 365 et seq.

[8] Weed v. Railroad Co., 17 N. Y. 362, approving 5 Duer (N. Y.) 193.

[9] 1 Rev. St. N. Y. p. 696, § 6; Sanb. & B. Ann. St. Wis. § 1595. In Isaacs v. Railroad Co., 47 N. Y. 122, it was held that the driver of a street car is not the driver of a carriage, within the meaning of this statute.

has no right to be there.[1] So, since it is within the general scope of a gateman's duty at a union depot to use force, if necessary, in proper cases, to prevent persons from going through the gate, or to compel their return if they improperly pass it, the company is lia-

§ 355. [1] Johnson v. Railroad Co., 58 Iowa, 348, 12 N. W. 329. It is for the jury to determine whether a ticket seller at an elevated railroad station, who has refused to sell an intending passenger a ticket, is acting in the scope of his employment in pushing such passenger so forcibly down the stairway that he falls over the railing and upon the pavement below. McKernan v. Railway Co., 54 N. Y. Super. Ct. 354. A recent North Carolina case goes to the limit of the rule. One who had been a passenger on a train called at a railroad station, with his baggage check, to get his baggage. When informed that there was a storage charge, he severely abused the station agent. The agent handed him his change, and, as he started to go out of the office, and when near the door, the agent picked up a gun, and shot and killed him. Held, that the question whether the agent was acting in the scope of his employment was for the jury, and their finding that he was, and that the company was liable for his act in shooting, will not be disturbed. The abusive language would justify the expulsion without the use of unnecessary force, and the company is liable for the excessive force used by the agent. Daniel v. Railroad Co. (N. C.) 23 S. E. 327. This decision would seem to be doubtful, because the act of the agent in shooting deceased as he was leaving the station was not an attempt to expel him from the station. If one who had purchased a railroad ticket intending to take a train about to arrive, but who failed to do so because he did not succeed in getting his baggage checked in time to be placed on the train, left the premises of the railroad company, and registered at an hotel, intending to take a train to his destination the next morning, and afterwards, on the day he purchased the ticket, returned to the station to make inquiries about or arrange for the storage and checking of his baggage, he was not at that time a passenger, but nevertheless had the right to go to the station for the purpose stated, and, if he conducted himself properly, was entitled to respectful treatment from, and immunity from unlawful assault by, the station agent while engaged in transacting with him the business

ble for an assault committed by the gateman in attempting to prevent a passenger from going through.[2] So, where a passenger, who has been roused from a drunken sleep, and has started for his train, merely attempts to come back into the depot, the railroad company is liable for the act of a policeman, employed by it at the depot to look after passengers, in striking him with a billy, causing the loss of an eye.[3] So, where an employé of a railroad company at a station is charged with the duty of keeping the men's waiting room and closet clear of loafers, the company is liable for his act in ejecting a drunken man in such a manner that a passenger entering the station is injured in the scuffle, though the servant was exceeding his detailed instructions.[4]

mentioned; and such an assault would, under such circumstances, give a right of action against the company. If, however, the real purpose in returning to the station was not to look after or arrange for the checking of baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for real or supposed breach of duty occurring at an earlier hour of the day, and a difficulty thereupon ensued, the two met as ordinary citizens, and the railroad company had no concern in what passed between them. Georgia Railroad & Banking Co. v. Richmond (Ga.) 25 S. E. 565.

[2] Indianapolis Union Ry. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219. Where a passenger has purchased a ticket for an elevated train, and has deposited it in the canceling box, the company is liable for the act of the gateman in denying him admittance to the train on the ground that he has not seen the ticket deposited, though assured by the ticket agent that the ticket has been purchased. Cagney v. Railway Co. (City Ct. N. Y.) 2 N. Y. Supp. 410.

[3] Texas & P. Ry. Co. v. Bowlin (Tex. Civ. App.) 32 S. W. 918.

[4] Gray v. Railroad (Mass.) 46 N. E. 397.

§ 356. SAME—DIRECTING OR ASSISTING PASSENGER IN BOARDING OR ALIGHTING.

In the management of the train, and in caring for passengers in entering and alighting from the train, the conductor is the representative of the company in whose service he is engaged. Hence the company is liable for his negligent act in jerking a passenger from a train about to start.[1] Where a street is wrongfully blocked by a freight train near a station, the company is responsible for the conductor's act in inviting a passenger, in a hurry to catch a train, to pass under the freight train. The conductor has power to control the train, and the passenger has a right to suppose that it will not be started until he can pass through.[2] But, broad as is the authority of the conductor, it is by no means unlimited. When the relation of carrier and passenger terminates, the authority of the conductor, as the representative of the company, is at an end. His authority ceases when the passenger has safely alighted from the train. Hence, where a passenger enters a wrong train through a mistake of his own, and undertakes to rectify the mistake by voluntarily leaving the train some distance from the station, without any request to be carried back, the authority of the conductor as the representative of the carrier terminates when a safe alighting place has been provided,

§ 356. [1] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197.

[2] Chicago, B. & Q. R. Co. v. Sykes, 96 Ill. 162, reversing 1 Ill. App. 520. See, also, ante, § 131.

and the passenger has left the train in safety, and it does not extend so far as to authorize the conductor to direct the passenger what course he shall pursue after leaving the train; and the company is not liable for his death, caused by being run over by another train while walking back pursuant to the conductor's directions.[3]

A railroad company is liable for the mistake of a ticket agent who directed a passenger to take a wrong train.[4] But it is not within the apparent scope of a station agent's authority to direct a passenger to get on a moving train. Any assistance or direction in getting upon trains comes from brakemen or other employés in the train service. It is a matter of common observation that agents and employés at railroad stations do not take part in the work of putting passengers upon trains. Hence such a direction by a station agent does not render the company liable for injuries sustained in getting on.[5]

The act of the driver of a street car in assisting passengers to get on board is in the course of his employ-

[3] Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352. A passenger who was asleep when the train reached his destination was carried a mile beyond, where he was discovered by the conductor, and put off at his own request. Held, that the fact that he was misled by the conductor as to his exact whereabouts, and that he did not know that it was necessary for him to cross a long bridge over a river, would not render the company liable for injuries sustained in attempting to cross it. The conductor was serving him, and not the company, in what occurred. Wilson v. Railroad Co., 68 Miss. 9, 8 South. 330.

[4] South & N. A. R. Co. v. Huffman, 76 Ala. 492.

[5] Chicago, R. I. & P. Ry. Co. v. Koehler, 47 Ill. App. 147.

ment, and makes the principal liable for negligence in its performance.[6]

But a flagman in the employ of a railroad company is not presumptively charged with the duty of seeing to the disembarking of passengers; and hence the company is not liable for his act in directing a passenger to alight from a moving train at an unsafe place, in the absence of any showing that it was his duty to assist passengers in alighting.[7]

It has been held, however, that, where a passenger is directed by one of defendant's servants to step from a moving train at destination, it need not appear that the servant was authorized to give such a direction to

[6] Drew v. Railroad Co., 26 N. Y. 49, 1 Abb. Dec. 556; Id., *42 N. Y. 429. To invite a person to jump on a moving railway train is not within the scope of the employment of a braken an, and the company is not liable for injuries to a 12 year old boy who attempts to board the train in response to such invitation. Cotter v. Railway Co., 15 Phila. (Pa.) 255. It is not within the apparent scope of a brakeman's authority to control the movements of the train. Such control is exercised by the conductor. Hence a drover traveling on a pass has no right to rely on a brakeman's statement that the train would stop for a while, and that he should look after his stock; and he cannot recover for injuries sustained, while so doing, by the sudden backing of the train, where he failed to notify the conductor of his intention to look after the stock. To entitle plaintiff to recover, he must show the authority of the brakeman to give such directions. Receivers of International & G. N. Ry. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

[7] Savannah, F. & W. Ry. Co. v. Wall, 96 Ga. 328, 23 S. E. 197. Where a passenger boarding a ferryboat trips over a rope on the gang plank, which is steep and slippery, a deck hand acts in the scope of his employment in reaching out and taking hold of the passenger; and where he jerks the passenger from the plank, with such force as to throw him onto the deck and break his leg, the ferry company is liable. Simonin v. Railroad Co., 36 Hun (N. Y.) 214.

passengers. There is a distinction between the case of a passenger and a trespasser. In the case of a trespasser it must appear that the servant was acting within the line of his duty, to render the company liable. But a carrier owes to its passengers the duty, especially in the nighttime, of giving them reasonable warning and direction as to alighting from the train at their destination. The passenger cannot know, at his peril, the authority of the various servants of the company; and, if one of them undertakes to give a passenger such warning or direction, the passenger is entitled to presume that he is authorized to do it, and is acting in the line of his duty in doing it.[8]

§ 357. SAME—INVITING PERSONS TO RIDE IN DANGEROUS AND PROHIBITED PLACES.

An invitation by a brakeman to a passenger to stand on the platform, so as to be prepared to alight as soon as the train should stop, is within the apparent scope of the brakeman's duty to assist passengers to alight, and the company is liable for an injury to a passenger who was thrown from the train by its sudden stopping.[1] But an invitation by a brakeman to ride on a switch engine, not engaged in carrying passengers, is not an act within the scope of his employment, so as to render the company liable for injuries inflicted by negligence in running the engine.[2]

[8] Wilburn v. Railway Co., 36 Mo. App. 203.

§ 357. [1] Baltimore & O. R. Co. v. Meyers, 10 C. C. A. 485, 62 Fed. 367.

[2] Stringer v. Railway Co., 96 Mo. 299, 9 S. W. 905.

An invitation by a driver of a horse car to children to get on the front platform of his car and ride, though in violation of his instructions from the company, is an act within the general scope of his employment; and a child who accepts the invitation innocently, and without any intention on her part to defraud the company of its fare, is not a trespasser, and may recover for injuries sustained through the driver's negligence.[3]

But a locomotive engineer has no apparent authority to permit persons to ride upon the train in violation of the rules of the company; and the granting of such permission to get on a moving freight train is an act beyond the scope of his employment, for which the company is not liable. The conductor is the superior officer, and has general charge and control of the train, admitting and discharging passengers, collecting fares, receiving and discharging freight, and directly representing the company in its intercourse with the public. The duties of the engineer are subordinate, and of an entirely different character. His place is on his engine, and nowhere else, and his duties are limited to running and managing his engine. With the admission or discharge of passengers he has nothing to do, except so far as the proper management of his locomotive may furnish them an opportunity to get on and off the train. No authority beyond this can be inferred from the usual course of business on railroad trains, or from powers which locomotive engineers usually have and exercise.[4] But, where it is customary

[3] Wilton v. Railroad Co., 107 Mass. 108.

[4] Chicago, B. & Q. R. Co. v. Casey, 9 Ill. App. 632.

for a railroad to transport shippers of live stock through its yards on the stock car or engine, a shipper of stock has a right to suppose that the engineer and the yard master in charge of his stock are authorized to invite him to ride on the engine to the stock yards, and the private rules of the company are not admissible to prove the contrary.[5]

§ 358. SAME—EJECTION OF PASSENGERS.

A distinction exists between the liability of a common carrier for the acts of its servants in ejecting a passenger and in ejecting a trespasser. It is bound by contract to carry a passenger to his destination, while no such duty exists as to a trespasser. Hence the carrier is liable for the wrongful ejection of a passenger by any of its servants, without regard to the question whether or not such servant was vested with apparent authority to make ejection,[1] while in the case of trespassers such apparent authority must appear.[2] So, also, the removal of a passenger entitled to ride is wrongful, though the method adopted is proper, while in the case of a trespasser the master can be held liable only for the improper manner in which the removal was effected.

It is settled, without controversy, that a railroad conductor represents the company in the whole management of the train; and the company is responsible for

[5] Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 162, 178, 14 N. E. 197.

§ 358. [1] Houston & T. C. R. Co. v. Washington (Tex. Civ. App.) 30 S. W. 719; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139.

[2] See post, § 359.

his wrongful expulsion of a passenger, without regard to his intention or motive in doing it.[3] So, there is no question that the company is liable for the conductor's abuse of authority in using excessive force to accomplish the removal of a passenger,[4] or in ejecting him from a moving train.[5]

In England, where it is the duty of a porter of a railway company to prevent passengers from going into a wrong train, the railway company is liable for injuries sustained by plaintiff in being violently pulled out of the carriage by the porter just after the train had started.[6] So, since porters have authority to re-

[3] Great Western Ry. Co. v. Miller, 19 Mich. 305; Moore v. Railroad Corp., 4 Gray (Mass.) 465; Higgins v. Railroad Co., 46 N. Y. 23; Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 374; Evansville & C. R. Co. v. Baum, 26 Ind. 70; Indianapolis, P. & C. Ry. Co. v. Anthony, 43 Ind. 193; Terre Haute & I. R. Co. v. Fitzgerald, 47 Ind. 79; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Curtis v. Railway Co., 12 U. C. C. P. 89; Williamson v. Railway Co., 17 U. C. C. P. 615. A railroad company which has instructed its conductor to remove from its cars passengers who refuse the fare fixed by the company is liable for any force used by a conductor in removing a passenger for this cause, if the fare demanded is illegal. It is also liable, even if the fare demanded is legal, for excessive force used by the conductor acting in the performance of this duty. Jackson v. Railroad Co., 47 N. Y. 274.

[4] Perkins v. Railroad, 55 Mo. 201; Travers v. Railway, 63 Mo. 421.

[5] Citizens' St. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627. A railway company is liable for the acts of its servants, charged with the duty of putting off passengers, in wrongfully expelling one when the train is moving at a high rate of speed. Cain v. Railway Co., 39 Minn. 297, 39 N. W. 635.

[6] Bayley v. Railway Co., L. R. 8 C. P. 148. "The question is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he was so acting,

move from a train a passenger misconducting himself, the company is liable for the act of one of its porters who ejects a passenger under the mistaken belief that he is wrongfully traveling in a carriage of a superior class.[7]

Since the conductor of a street car is invested with the implied authority of determining who ought to be admitted or excluded from the car, the company is liable for his wrongful exercise of this authority in ejecting a passenger rightfully on the car,[8] or in ejecting him from a moving car.[9] So, though the act of the conductor in excluding a colored passenger from a street

then, however much he may have abused his authority, however improperly or blunderingly he may have acted, the defendants are liable." Id.

[7] Lowe v. Railroad Co., 5 Reports, 535. A guard of an omnibus has authority to eject a troublesome passenger from his employer's omnibus; and if, as matter of fact, the passenger has not been misconducting himself, the employer is liable for the mistaken act of the guard. Seymour v. Greenwood, 6 Hurl. & N. 359.

[8] Passenger R. Co. v. Young, 21 Ohio St. 518. A street-railroad company is liable for the act of its conductor in ejecting a passenger, whether the act is done negligently, wilfully, or maliciously. Burns v. Railroad Co., 4 App. Div. 426, 38 N. Y. Supp. 856.

[9] Hart v. Railroad Co., 86 Wis. 483, 57 N. W. 91; Schultz v. Railroad Co., 89 N. Y. 242. A conductor of a street car would be acting in the ordinary course of his employment if he removes from the car a passenger who refuses to pay fare; and when he makes a blunder, and negligently and brutally removes one who is willing to pay his fare, the company is liable. Smith v. Tramways Co., 55 J. P. 630. So a street-railway company is liable for the act of one of its drivers in wrongfully ejecting a passenger from a car while in motion, even though the act of the driver be forcible, malicious, and willful, and not merely negligent. Meyer v. Railroad Co., 8 Bosw. (N. Y.) 305.

car is wholly unauthorized by the company, yet it is liable for the actual damages sustained by the passenger by reason of the wrongful expulsion.[10] The owners of a vessel are liable to a passenger for the act of their captain in causing the passenger to be disembarked at an intermediate port, under an unfounded accusation that he is a pickpocket, and belongs to the swell mob.[11]

§ 359. SAME—EJECTION OF TRESPASSER.

It is settled without dispute that a conductor, by virtue of his office, has implied authority to remove a trespasser from a train in a proper manner, and that, therefore, a railway company is liable for his removal of a trespasser in an improper manner; as, where he uses excessive force, or accomplishes the removal when the train is in motion.[1] So, a railroad company is liable for the act of its conductor in shooting a trespasser on its train while he was running across the caboose to get off in obedience to the conductor's order.[2]

[10] Turner v. Railroad Co., 34 Cal. 594.

[11] Coffin v. Braithwaite, 8 Jur. 875.

§ 359. [1] Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Kline v. Railroad Co., 37 Cal. 400; Northwestern R. Co. v. Hack, 66 Ill. 238; North Chicago City Ry. Co. v. Gastka, 128 Ill. 613, 21 N. E. 522; Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842; Holmes v. Wakefield, 12 Allen (Mass.) 580; Stone v. Railway Co., 88 Wis. 98, 59 N. W. 457. A railroad company is liable for the use of excessive force by its agent, acting within the scope of his authority, in expelling a person from its car. New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. Law, 137.

[2] Higgins v. Railway Co. (Ga.) 25 S. E. 837.

But on the question whether it is within the scope of the implied authority of a brakeman to remove trespassers the courts are divided. The New York courts hold that he has such implied authority, and that, therefore, the railroad company is liable for the improper manner in which he exercises it, without further proof on the subject of his authority. "His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders who jump on the train for a ride, without intention of becoming passengers, are wrongfully thereon. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence; would it not be a good defense to an action against him for the assault that he was a brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common experience and observation." [3] Hence it has been held that the railroad company is liable for the act of a brakeman in kicking a trespassing boy from a moving train,[4] or for forcing him therefrom by throwing water

[3] Hoffman v. Railroad Co., 87 N. Y. 25, reversing 46 N. Y. Super. Ct. 526, 44 N. Y. Super. Ct. 1. See, also, Hughes v. Railroad Co., 36 N. Y. Super. Ct. 222.

[4] Hoffman v. Railroad Co., 87 N. Y. 25, reversing 46 N. Y. Super. Ct. 526, 44 N. Y. Super. Ct. 1.

in his face,[5] or by throwing pieces of coal at him.[6] These cases have been followed in Alabama,[7] Kansas,[8] Kentucky,[9] and Minnesota.[10] So, the supreme court of Mississippi has held that where a flagman, whose duty it is, on discovering a trespasser on a train, to take him to the conductor, and then, if so directed, to stop the train and put him off, ejects a trespasser on his own responsibility while the train is in motion, the company is liable for the resulting injury.[11] On the other hand, other courts have held that a brakeman has no implied authority to remove trespassers from the train, and that, before the company can be held liable for his acts in this respect, it must be made to

[5] Clark v. Railroad Co., 51 Hun, 637, 3 N. Y. Supp. 607; Id., 40 Hun, 605.

[6] Lang v. Railroad Co., 51 Hun, 603, 4 N. Y. Supp. 565, affirmed 123 N. Y. 656, 25 N. E. 955; Id., 80 Hun, 275, 30 N. Y. Supp. 137. A railroad company which has set apart a car for females traveling alone or accompanied by males, has given proper notice thereof, and has placed brakemen at the doors of such a car to direct males not accompanied by females to another car, is liable for the act of such a servant in using excessive force to remove a male passenger from the car, though he went beyond his instructions in using force. Peck v. Railroad Co., 70 N. Y. 587, affirming 8 Hun (N. Y.) 286, 4 Hun (N. Y.) 236.

[7] Mobile & O. R. Co. v. Seales, 100 Ala. 368, 13 South. 917; Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 9 South. 303.

[8] Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 655, 14 Pac. 172.

[9] Smith v. Railroad Co., 95 Ky. 11, 23 S. W. 652.

[10] A freight brakeman has implied authority to eject trespassers, and apparent trespassers, from the freight cars of the train. But the presumption that he has such authority may be rebutted by evidence showing that such authority was expressly withheld, or its exercise forbidden. Brevig v. Railway Co., 64 Minn. 168, 66 N. W. 401.

[11] Southern Ry. Co. v. Hunter (Miss.) 21 South. 304.

appear that he had such authority. This is the rule in Indiana,[12] Missouri,[13] Pennsylvania,[14] Texas,[15] and perhaps Iowa.[16] "The court cannot take judicial notice that it is within the line of a brakeman's duty to put trespassers off the train, and there must be proof of this fact." [17] "We fail to see that any necessity exists for conferring authority on a brakeman to eject trespassers from the cars. The conductor has this power, and it is to be presumed power also to call to his aid the other servants of the company upon the train. The name 'brakeman' would imply that it is the principal duty of that servant to attend to the brakes, and

[12] Lake Shore & M. S. Ry. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480. A rule of the company requiring the brakeman to guard the train from danger during the trip confers no authority on him to remove trespassers. Id. Rehearing pending.

[13] Farber v. Railway Co., 116 Mo. 81, 22 S. W. 631; Id., 32 Mo. App. 378.

[14] Towanda Coal Co. v. Heeman, 86 Pa. St. 418.

[15] International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039; Receivers of International & G. N. Ry. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236; Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Galaviz v. Railroad Co. (Tex. Civ. App.) 38 S. W. 234.

[16] Marion v. Railroad Co., 59 Iowa, 428, 13 N. W. 415. Under Code Iowa, § 1307, which renders railroad corporations liable for the willful wrongs of their agents and employés committed in the use and operation of the road, a company is liable for the acts of its employés within the scope of their employment, whether the act be one of negligence, or a willful and criminal wrong; and a trespasser who was kicked or pushed from a rapidly moving train by a brakeman authorized to remove trespassers may recover from the company for the injuries resulting therefrom. Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86, disapproving De Camp v. Railroad Co., 12 Iowa, 348; Cooke v. Railroad Co., 30 Iowa, 202.

[17] Farber v. Railway Co., 116 Mo. 81, 22 S. W. 631.

it is not to be inferred that he has control over the train, or any particular car or set of cars." [18] Of course, it is always competent to show that brakemen in fact possessed authority to remove trespassers; and, when that fact is proven, the company is liable for the abuse of such authority.[19] This authority may be shown by evidence that brakemen are subject to the orders of conductors, and that conductors on defendant's road had ordered brakemen to eject trespassers, and that brakemen were in the habit of doing so.[20] So, evidence that brakeman of railroad trains are in the habit of ejecting tramps who refuse to pay fare is admissible

[18] International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039.

[19] Where there is evidence that it is within the scope of the employment of a brakeman on a freight train to eject persons from the train, the court cannot charge that it is not within the implied authority of the brakeman to eject persons from the train. And in such a case it is not necessary that the servant should have authority to do the particular act resulting in the injury. The particular act may be directly in conflict with the express orders of the master, yet, if it be done in furtherance of the master's business, and to accomplish that which has been committed to him by general or special authority, the master will be held liable for the consequences. Texas & P. Ry. Co. v. Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331.

[20] Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86. Though the expulsion of trespassers from the cars by a brakeman is not a duty incident to the position he occupies, and authority to do so does not arise by implication, yet if it was the custom for brakemen to eject trespassers, and the railroad company knew, or ought to have known, of the custom, authority to do so may be inferred, and the company be held liable for damage resulting from an improper and unlawful exercise of authority by the brakeman. But the fact that brakemen on trains run by a certain conductor were in the habit of ejecting trespassers, with his knowledge and consent, does not establish a custom on the part of all brakemen on the road to eject trespassers in

to prove that it is within the line of the brakemen's duty to do so.[21] But it is not competent to prove the duties of a brakeman by the testimony of one who has only been around the train a few times when the brakemen were attending to their duties, and who testified that he had no other knowledge of their duties than what he had observed, and what he had been told by the railroad men they were supposed to be.[22]

But even courts which concede the implied authority of a brakeman to remove a trespasser hold that, where a person bribes a brakeman to permit him to ride among the freight in a freight car, the brakeman and such person thereby become joint trespassers, and the brakeman's implied authority to represent his employer in ejecting such person thereby ceases; so that, unless it appears that the brakeman had received subsequent express authority to eject such person, his act of doing so in an improper manner was simply the assault of one joint trespasser upon another, and not the act of the railway company.[23] So, a trespasser riding on a train in collusion with the conductor, intending to defraud the company out of the fare, cannot recover for injuries sustained in being ejected from the moving train by a brakeman.[24]

violation of the company's rules, which require ejections to be made by the conductors. Chesapeake & O. R. Co. v. Anderson (Va.) 25 S. E. 947.

[21] St. Louis, I. M. & S. Ry. Co. v. Hendricks, 48 Ark. 177, 2 S. W. 783.

[22] Farber v. Railway Co., 116 Mo. 81, 22 S. W. 631.

[23] Brevig v. Railway Co., 64 Minn. 168, 66 N. W. 401.

[24] Williams v. Railroad Co. (Miss.) 19 South. 90.

A street-car driver has the implied authority to eject trespassers, and therefore the company is liable for the use of excessive force by him in accomplishing the ejection,[25] or in compelling the trespasser to leave the car while in rapid motion.[26]

Where it appears that sleeping-car porters are mere menials employed to clean up the car and keep it in order, and to wait upon passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor, the sleeping-car company is not liable for an assault committed by a porter on a stranger, who had asked permission to enter a sleeping car to wash his hands.[27] But a railroad company is liable for the act of one of its porters in ejecting a trespasser from a rapidly moving train, if the porter had authority to eject trespassers.[28]

The removal of a person wrongfully on an engine is within the scope of the employment of those to whom

[25] Shea v. Railroad Co., 62 N. Y. 180, affirming 5 Daly (N. Y.) 221.

[26] Lyons v. Railroad Co. (City Ct. N. Y.) 10 N. Y. Supp. 237; Amato v. Railroad Co., 9 Misc. Rep. 4, 29 N. Y. Supp. 51; Baber v. Railroad Co., 10 Misc. Rep. 109, 30 N. Y. Supp. 931; Day v. Railroad Co., 12 Hun (N. Y.) 435, affirmed 76 N. Y. 593. The act of a driver of a street car in ejecting a boy, who refused to pay fare, from the front platform while the car is in motion, renders the company liable for injuries to the boy, whether or not it was a part of the driver's duty to collect fare, since his duty as driver required him to stop the car before ejecting any one from the platform. Healey v. Railroad Co., 28 Ohio St. 23.

[27] Williams v. Car Co., 40 La. Ann. 87, 3 South. 631.

[28] St. Louis S. W. Ry. Co. v. Huffman (Tex. Civ. App.) 32 S. W. 30; Harlinger v. Railroad Co., 15 N. Y. Wkly. Dig. 392, affirmed 92 N. Y. 661.

its care, management, and control have been intrusted. Authority to take charge of an engine would include authority to remove from it any thing or person whose presence upon it might in any way interfere with its use. Such authority is indispensably necessary to enable the servant to transact the business of the master.[29] Hence the company is liable for the ejection of a trespasser by the engineer while the locomotive is in motion.[30]

A railroad company which has authorized its baggagemen to prevent all persons from riding on the platforms of baggage cars is liable for the act of a baggage man in kicking a trespassing boy from the platform while the train is in motion.[31]

§ 360. SAME—FALSE IMPRISONMENT AND ARREST.

Where a statute makes it a crime to attempt to defraud a railroad company of fare, the superintendent of the line or an inspector at the station has implied authority to cause the arrest of offenders, and the company is therefore liable for their mistake in causing the arrest of an innocent person.[1] "Where there is a ne-

[29] Carter v. Railway Co., 98 Ind. 552.

[30] Carter v. Railway Co., 98 Ind. 552; Chicago, M. & St. P. Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788; s. c., 24 Ill. App. 44; Chicago, M. & St. P. Ry. Co. v. Doherty, 53 Ill. App. 282.

[31] Rounds v. Railroad Co., 64 N. Y. 129, affirming 3 Hun (N. Y.) 329.

§ 360. [1] Goff v. Railway Co., 3 El. & El. 672; Moore v. Railway Co., L. R. 8 Q. B. 36. Where a ticket agent and a station master detain a passenger for the purpose of searching him upon the belief that he had stolen a ticket, and was attempting to travel on the railway without payment of fare, in violation of a statute, the detention and search are within the scope of the servants' authority, and de-

cessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority is prima facie evidence that he had authority, and the presumption that he had authority must be rebutted by the company." [2]

Similar decisions have been made in this country. Where a ticket agent charges a passenger with having passed counterfeit money in payment for a ticket, demands genuine money in its place, and, on her refusal to pay again, becomes angry, calls her a counterfeiter and a common prostitute, detains her at the station for a while, with the intention of procuring a policeman, but finally lets her go, the company is responsible for the ticket agent's act. "The ticket agent was acting for his employers, and with no other conceivable motive, losing his temper and injuring and insulting plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property, and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury." [3]

fendant is liable for their mistaken exercise of it. Van Den Eynde v. Railway Co., 5 Ir. R. C. L. 328.

[2] Blackburn, J., in Moore v. Railway Co., L. R. 8 Q. B. 36.

[3] Palmeri v. Railroad Co., 133 N. Y. 261, 30 N. E. 1091, affirming 60 Hun, 579, 14 N. Y. Supp. 468.

So, a gatekeeper at a station of an elevated railroad, who is instructed not to let passengers out till they either pay fare or show a ticket, is acting within the apparent scope of his employment when he detains a recalcitrant passenger at a station, causes his arrest, goes with the police officer to the police station, there makes a complaint, and then next morning appears before the police magistrate, and renews his complaint.[4]

To render a railroad company liable for the arrest of a passenger on its train, without a warrant, by order of a railroad detective, it is not necessary that the company should have authorized the detective to make an arrest without a warrant. If he had the general authority, actual or apparent, to act for the defendant in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in its behalf, then the mode of execution of such power, with warrant or without, was immaterial, and the defendant was liable in either event. If the master orders the thing done, he is responsible for the manner in which the servant does it.[5] Thus, a railway detective authorized to ferret out crimes against the company, who has gen-

[4] Lynch v. Railroad Co., 90 N. Y. 77, affirming 24 Hun (N. Y.) 506. A carrier is liable for the act of its gate keeper in assaulting a passenger because he attempted to go through the gate after the whistle had sounded, and in causing such passenger to be arrested on a charge of disorderly conduct. Hamel v. Ferry Co., 53 Hun, 634, 6 N. Y. Supp. 102. A street-car company is liable for the act of its driver in ejecting a passenger from the car, upon the mistaken ground that he had not paid his fare, and in directing his arrest. White v. Railroad Co., 20 N. Y. Wkly. Dig. 510.

[5] Duggan v. Railroad Co., 159 Pa. St. 248, 28 Atl. 182, 186.

eral instructions not to make arrests without first consulting local attorneys of the road, but who is authorized to make arrests without such consultation where the proof is clear and there is danger of an escape, is acting within the scope of his authority in causing the arrest, without consultation, of a passenger on a charge of attempting, in the presence of the detective, to pass counterfeit money on a station agent in payment of fare, and the company is liable if it turns out that the charge was unfounded.[6]

A conductor in charge of a train is acting within the line of his employment when he causes the arrest of a passenger on a charge of disorderly conduct while on the train; and the company is liable for his act if it turns out that the charge was groundless.[7] So, a street-railroad company is liable for the act of its driver in causing a passenger's arrest on an unfounded charge of disorderly conduct, where the driver assumed to act under a statute authorizing the arrest of disorderly passengers, though the company had not conferred on him an authority to make arrests.[8]

Very close questions have, however, arisen as to whether a servant is acting within the scope of his authority in making arrests. Thus, it has been held in

[6] Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219.

[7] Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 41 Pac. 952; Gillingham v. Railroad Co., 35 W. Va. 588, 14 S. E. 243. But in Cunningham v. Power Co., 3 Wash. St. 471, 28 Pac. 745, it was held that the act of the conductor of a street car in causing the arrest of a passenger for disorderly conduct is outside the scope of his authority, and the company is not liable therefor.

[8] Rown v. Railroad Co., 34 Hun, 471.

England that a clerk of a railroad company, whose duty it is to issue tickets to passengers, and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person who, he suspects, has attempted to rob the till, after the attempt has ceased, as such arrest would not be necessary for the protection of the company's property.[9] A very similar decision was made by the New York court of appeals, where it was held that a station agent was not acting in the scope of his employment in taking money which he believed to be counterfeit in payment of fare, and then pointing out the offender to the police, and directing his arrest, but that he was acting as a citizen aiding the police in the detection and arrest of counterfeiters, and that, therefore, the company was not liable when it appeared that the charge was unfounded. "If the ticket agent had been cheated or imposed upon by plaintiff, or if he honestly believed he had been, and then attempted to recover what he had, or supposed he had, lost, by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interests of the defendant, and therefore acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person, applying to purchase a ticket, what he believes to be a counterfeit five-dollar bill, not, of course, in good faith, or in the regular

[9] Allen v. Railway Co., L. R. 6 Q. B. 65. A presumption that a station agent was authorized by defendant to make arrests for traveling without payment of fare does not arise, where it appears that the station was not used by defendant exclusively, but also by other companies. Roe v. Railway Co., 6 Exch. 36.

course of business, but for the purpose of aiding the police in the detection of criminals, and then immediately directs the arrest of the person from whom he took the bill. Such an act on his part is not binding on his principal. If he was in fact acting within the scope and in the line of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such money, except upon receipt of what he at least believed to be good money." [10]

It has been held not within the apparent scope of a conductor's duty to cause the arrest of a passenger on a charge of passing counterfeit money; [11] nor within that of a street-car driver, where he had no instructions to cause such arrests to be made, and he is personally charged by the company with all counterfeit money accepted by him.[12]

Of course, whenever it appears that the servant of a railroad company had probable cause for directing an

[10] Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952, reversing 60 Hun, 579, 14 N. Y. Supp. 456. A gateman employed to see that passengers deposit their tickets at the terminus of a railroad, and to prevent the exit of passengers who omit to make such deposit, has no constabulary right to pursue and bring back an offending passenger failing to comply with the regulations after the passenger has been allowed to depart from the depot grounds, nor has the gateman the power to direct a policeman to bring the offender back. Such acts are in excess of the gateman's implied authority, and do not bind the railroad company unless it expressly authorizes them. The gateman, by virtue of his position, is merely authorized to prevent infractions of the regulations, and not to punish past transgressions. Corwin v. Railroad Co., 2 City Ct. R. (N. Y.) 106.

[11] Galveston, H. & S. A. Ry. Co. v. Donahoe, 56 Tex. 162.

[12] Lafitte v. Railroad Co., 43 La. Ann. 34, 8 South. 701.

arrest, the company is not liable, since the servant himself is not liable.[13]

§ 361. SAME—ENFORCING PAYMENT OF FARE.

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of passengers, as well as of the subordinate servants of the corporation, and the collection of fares. Hence a railroad company is liable for the act of its conductor in wresting a parasol from a female passenger to enforce payment of her fare.[1] In a Canadian case, however, it was held that a porter on a steamboat, though acting under directions of the purser, is outside the scope of his employment in wrenching a valise from a passenger as security for fare, since the carrier itself could not take a passenger's baggage out of his possession for the purpose of acquiring a lien for fare.[2]

[13] Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615. A passenger dropped a bad nickel into a street-car box in payment of fare, and, on his attention being called to it by the driver, he refused to redeem. He was afterwards arrested, at the instance of the officers of the company, on a charge of passing counterfeit coin; but at the hearing before a United States commissioner he was discharged, because there was no evidence of his knowledge that it was counterfeit. Held, that there was probable cause for his arrest, and that the street-car company was not liable. Id.

§ 361. [1] Ramsden v. Railroad Co., 104 Mass. 117.

[2] Emerson v. Navigation Co., 2 Ont. 528.

§ 362. SAME—DIRECTING PERFORMANCE OF PERILOUS SERVICE.

A brakeman has no authority to direct a boy riding on a freight train as a passenger to perform a perilous service, where it appears that the conductor has entire charge of the train and of all persons on it; and the company is not liable for injuries sustained in an attempt to comply with the order.[1] So, a fireman on an engine has no authority to invite a boy standing near the water tank to put the hose in the engine, and turn on the water; and the company is not responsible for the death of the boy, who was thrown from the tender by detached cars striking the engine with their ordinary force.[2]

§ 363. SAME—WARNING PASSENGERS OF DANGER.

A brakeman stationed in the lookout of a cupola in a caboose is acting in the line of his employment in warning passengers of impending danger, and the company is liable for his negligence in calling to passengers to jump from the train when there is no danger, in consequence of which several jump from the train.[1] So, a railroad company, running a mixed train, is answerable for injuries to a passenger who jumped from the train on account of the negligent and terrifying acts of one of its brakemen, made in the car in which

§ 362. [1] Sherman v. Railroad Co., 72 Mo. 62.

[2] Flower v. Railroad Co., 69 Pa. St. 210.

§ 363. [1] McPeak v. Railway Co., 128 Mo. 617, 30 S. W. 170. See, also, ante, § 185.

the passenger was being carried, and from which he might reasonably infer that a wreck of the train was imminent, though such brakeman had no express duty to perform in or about the car, or in the direction of passengers, and no real danger was imminent.[2]

§ 364. SAME—VIOLATION OF MASTER'S ORDERS.

Where a servant does an act within the scope of his apparent authority, and within the course of his em-

[2] Ephland v. Railway Co. (Mo.) 37 S. W. 820. The court said: "Had a wreck of the train really been imminent, and passengers could have been saved by timely warning, who can doubt the duty and authority of any one employed upon the train to assist in its management to give timely warning? This would be a duty, not merely of humanity, which all humane persons would perform, but a duty to the master, and in furtherance of his business. In such an emergency, in which the avoidance of the threatened danger required prompt action, a brakeman who discovered the peril would surely not be required to hunt up the employé who was expressly authorized to direct passengers, in order that the warning might be regularly given. If, in case of such an emergency, any brakeman on the train could, in the name of the company, give the passengers warning of the danger, they would have the right to rely and act upon such warning. It could make no difference that no real danger was imminent, as in this case. If the brakeman had authority to give the warning in case of actual danger, the passenger had the right to rely and act upon one, though there was really no danger, and he had in fact no good reason for apprehending it. * * * In cases of emergency, in which the lives of passengers and the destruction of property are threatened and are imminent, the nature and purpose of the employment of a brakeman imply the duty to give aid whenever necessary, in preventing the threatened disaster; and, in circumstances of peril, fright, and panic, passengers have the right to rely on his directions. The scope of authority is determined from the general nature of the employment, and the emergency calling for its exercise, as shown by the evidence in the particular case."

ployment, the master is not relieved from liability by the fact that he has expressly forbidden the act. Hence, where a sleeping-car porter negligently drops a pistol while attending to his employer's business, and it is discharged, wounding a passenger, the sleeping-car company is liable for the injury, though the porter received the pistol from another passenger, contrary to the company's orders forbidding the porter to receive any baggage or package from passengers.[1] So, a railroad company is liable for the act of a servant employed to attend to the ladies' room at the station, in wrongfully ejecting a colored woman therefrom, though the company had instructed him not to discriminate between white and colored passengers as to the use of the depot.[2] So, a railroad engineer who runs a wild engine from one station to another, on the running time of a passenger train going in the opposite direction, is still in the line of his employment, though he is acting in violation of the company's rules, and without an order from the train dispatcher; and the company is liable for an injury to a passenger caused by a collision of the two trains.[3] So, a railroad company is liable for the act of its ticket agent in selling a ticket at a higher rate of fare than allowed by law, though the overcharge is made contrary to the company's express orders; and the company is liable for the statutory penalty on account of such overcharge.[4]

§ 364. [1] Heenrich v. Car Co., 20 Fed. 100.

[2] Redding v. Railroad Co., 3 S. C. 1.

[3] Fitzsimmons v. Railway Co., 98 Mich. 257, 57 N. W. 127.

[4] St. Louis & S. F. R. Co. v. Ryan, 56 Ark. 245, 19 S. W. 839.

§ 365. ABSOLUTE LIABILITY OF COMMON CARRIERS.

A common carrier, being bound by the contract of carriage to guard passengers from assault and insult, is liable, not only where the assault or insult is permitted by the negligence of his servants, but also where it is committed by them willfully, maliciously, or capriciously.

We have seen that a common carrier owes its passengers the duty of exercising the highest practicable degree of care and skill to guard them from assaults and insults on the part of strangers or fellow passengers, and that the carrier is liable for such assaults and insults whenever its servants are guilty of negligence in not preventing them.[1] Since the duty of exercising vigilance in preventing such assaults rests equally on all the carrier's servants, the courts have almost unanimously come to the conclusion that the carrier is liable, not only where the servants negligently permit such an assault by a third person, but also where they themselves commit it. In a leading case [2] on this subject, the ground of the carrier's liability was thus stated: "The law requires the common carrier of passengers to exercise the highest degree of care that human judg-

§ 365. [1] See ante, c. 7.

[2] Goddard v. Railway Co., 57 Me. 202. In this case, a railroad company was held liable for the act of a brakeman, in using coarse and profane language to a passenger, charging him with attempting to evade the payment of fare, shaking his fist in the passenger's face, threatening to split his head open and to spill his brains there on the spot.

ment and foresight are capable of, to make his passenger's journey safe. * * * If the passenger does not have such care, but, on the contrary, is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to a passenger for the damages he thereby sustains." So, the supreme court of the United States [3] has laid down the rule that a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its servants, employed in executing the contract of transportation, and acting within the general scope of their employment. Perhaps the strongest statement of the reasons for this rule is that of Chief Justice Ryan,[4] of the Wisconsin supreme court, in a case where a railroad company was held liable for the act of a conductor in forcibly kissing a female passenger: "It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach, by the agent, of the contract which he was appointed to perform for the principal; as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while the wolf makes away with a sheep, the owner is liable, but if the dog

[3] New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, affirming 18 Fed. 156. In this case a steamboat company was held liable for excessive force used by one of its employés in removing a deck passenger from a portion of the boat where he had no right to be.

[4] Craker v. Railway Co., 36 Wis. 657.

play wolf, and devour a sheep, the owner is not liable. The bare statement of the proposition seems a reductio ad absurdum. The cardinal difficulty in the argument is that it limits the contract. The carrier's contract is to protect the passenger against all the world. The appellant's construction is that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her; reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books would lead us to sanction so vicious an absurdity. The contract of carriage was very surely the contract of appellant, not of the agent who sold the ticket. It rested with appellant to perform it, by agents of its own choice, on its own responsibility. It chose the officers of the train, with the conductor at their head, to perform its contract for it. Where was the corporation, and by whom represented, as to this contract and this passenger? Not, surely, in some foreign board room, by directors making regulations and appointing agencies for the corporate business. They could not perform this contract. Not, surely, in some distant office, by a superintendent or manager, issuing the orders of the directors to his subordinates. He could not perform the contract. Quoad this contract and this passenger, the corporation was present on this train to keep it, and to care for her, represented by the officers of the train, who possessed, pro hac vice, the whole power and authority, and were the living embodiment, of the ideal entity which made the contract, was bound to keep it, and is appellant here to contend that it has no responsibility for the flagrant

violation of the contract, which the respondent paid it to make and keep, by its present representatives appointed to keep it in its behalf. Like the English crown, it lays its sins on its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant as tortiously broke this contract as surely as it made it; committed this tort as surely as it made this contract." [5]

[5] In Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. 319, reversing 45 Hun (N. Y.) 139, it is said: "The duty of protecting the personal safety of the passenger, and promoting, by every reasonable means, the accomplishment of his journey, is continuous, and embraces other attention and services than the occasional service required in giving a passenger a seat or some temporary accommodation. Hence whatever is done by the carrier or its servant which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it." In Nieto v. Clark, 1 Cliff. 145, Fed. Cas. No. 10,262, it was said: "Passengers are entitled to respectful treatment from the master and other officers in charge of the vessel, and may well claim to be exempt from insult and personal violence from the crew. They do not contract merely for ship room and the right to personal existence, but for suitable food, comforts, and necessaries, and for protection against personal rudeness from all those in charge of the vessel, and every wanton interference with their persons. In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach." In this case it was held that an attempted rape on a female passenger by a seaman warranted his discharge in a foreign port. In Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922, it was said: "The principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy. They are not stran-

It should be noted, however, that there are a few cases in apparent conflict with this rule. In an early South Carolina case it was held that the captain of a steamboat is not liable for injury to a passenger caused by the accidental or careless discharge of a gun by the engineer, a free mulatto, because he was not acting within the scope of his employment.[6] So, in a recent Pennsylvania case it was held that a ferry proprietor is not liable for the drowning of a passenger, who was thrown overboard by one of the ferrymen during a

gers, bearing no other relations to each other than one citizen, merely as such, bears to another; but the defendant was a carrier of passengers by water, and the plaintiff was a passenger on board the steamer of defendant, which was engaged in carrying passengers for hire between two commercial ports. * * * Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents, employed in the management of the ship or other conveyance; and for the fulfillment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employer, may proceed against the carrier as the party bound to make compensation for the breach of the obligation." In this case, the carrier was held liable for a violent assault committed on a passenger by a clerk of a steamer while engaged in his duty of collecting fare. See, also, Lakin v. Railroad Co., 15 Or. 220, 15 Pac. 641; Indianapolis Union Ry. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; Chicago, R. I. & P. R. Co. v. Barrett, 16 Ill. App. 16; Palmeri v. Railway Co., 133 N. Y. 261, 30 N. E. 1001, affirming 60 Hun, 579, 14 N. Y. Supp. 468.

[6] McClenaghan v. Brock, 5 Rich. Law (S. C.) 17, 27. It was said that a free servant and the master are both sui juris. Both are equally capable of accounting for a tort civiliter. A slave is not. That makes the difference as to the master's liability for the willful torts of his free servants and of his slaves.

quarrel about a matter which did not appear in evidence.[7]

§ 366. SAME—APPLICATIONS OF RULE.

Whenever a passenger on the conveyance of a common carrier is unjustifiably assaulted and beaten by an employé who owes him the duty of protection, the car-

[7] Scanlon v. Suter, 158 Pa. St. 275, 27 Atl. 963. A railroad company is not liable for the criminal and malicious act of an employé, having no control of or connection with an engine standing on a side track, in moving it past several switches to the main track, and there sending it forward unattended until it comes into collision with a passenger train, injuring a passenger. Mars v. Canal Co., 54 Hun, 625, 8 N. Y. Supp. 107. So it has been said that a carrier is bound merely to exercise the highest degree of practicable care and skill in guarding a passenger from an assault by one of its servants outside of the scope of his employment. Louisville & N. R. Co. v. Kelly, 92 Ind. 371. A colored boy boarded defendant's passenger train, and, by mistake, got into the car used for express and baggage. The express messenger, not in the railroad company's employ, called the baggage master, a servant of the railroad company, to come in, that they might have sport with the boy. The baggage master left his own compartment, and complied. Being frightened by the language and conduct of the two men, the boy jumped from the running train, receiving fatal injuries. Held, that the railroad company is not liable for the acts of the baggage man, unless he was about his business when he quit his compartment and went into the other, and participated in the conduct which caused the injury. Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South 933. The road master of a railroad and a sleeping-car conductor engaged in a friendly scuffle, during which one of them was unintentionally knocked against a passenger about to board a train, knocking him from the platform. Held, that they were not acting in the scope of their employment while so scuffling, and that the company was not liable for the injuries to the passenger sustained in the fall. Goodloe v. Railroad Co., 107 Ala. 233, 18 South. 166.

rier is liable for the injury suffered.[1] In numerous cases railroad companies have been held liable for assaults on passengers by conductors; as, for example, where the conductor, after an altercation with a passenger standing on the car platform, returns to a car in which the passenger is then seated, and, approaching him from the rear, knocks him down, and maltreats him.[2] So, a railroad company is liable for the willful

§ 366. [1] Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 41 Pac. 952.

[2] Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139. A railroad company is liable for an assault on a passenger committed by the conductor, who accused the passenger of an attempt to defraud the company out of fare by getting on the train at a station preceding the one named in his ticket, and who violently beat the passenger when the latter resented the imputation, and offered to prove his statement by another passenger in an adjoining coach. Randolph v. Railway Co., 18 Mo. App. 609. And also where the conductor, under the mistaken belief that a passenger had boarded the train to commit a robbery, pulls him from his seat, and strikes him on the head with a pistol, thinking that he is about to draw his own. Texas & P. Ry. Co. v. Graves, 2 Posey, Unrep. Cas. (Tex.) 306. A colored man had had a difficulty with the conductor and baggage master, arising out of their refusal to check his baggage, and the parties were arrested. Several months later the colored man was a passenger on the conductor's train, and the conductor recognized him, threatened to shoot him, and went to get his pistol for that purpose. The colored man was frightened, and jumped from the train while in motion. Held, that the company was liable. Gasway v. Railroad Co., 58 Ga. 216. Where a conductor of a freight train, after refusing to carry a person who had applied to him for that purpose, uses insulting language to and strikes such person with a lantern, instead of using reasonable force to eject him, the company is liable for the assault. Western & A. R. R. v. Turner, 72 Ga. 292. A declaration which alleges that, while plaintiff was a passenger on defendant's train, he was called out by the conductor at an intermediate station, and there assaulted and beaten by the conductor, is not demurrable for failure to allege

or negligent act of its conductor and brakeman, while washing out the caboose attached to the train, in turning a jet of water on a passenger, though neither was authorized to wash out the cars of the company for any purpose.[3] This liability extends to the tortious acts of its employés done about its business, in checking the baggage of passengers at the several stations along its line of road, and to the platform or area along its cars necessary to be used by the passengers in attending to procuring seats and checking baggage, and other lawful and peaceful acts in connection with their travel; and hence the company is liable for an assault on a colored passenger by the baggage master and the conductor, during a dispute caused by their failure to check his baggage.[4]

While it is doubtful whether a brakeman, in the absence of express orders, has authority to eject a trespasser, it is nevertheless true that a railway company is liable for an injury wantonly inflicted by a brakeman on a passenger.[5]

that the conductor was then and there acting in the prosecution and within the scope of his business, since that will be presumed from the fact that plaintiff was a passenger on the train. Peeples v. Railroad Co., 60 Ga. 281.

[3] Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19.

[4] Gasway v. Railroad Co., 58 Ga. 216.

[5] Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85; Lampkin v. Railroad Co., 106 Ala. 287, 17 South. 448. A passenger got into an altercation with a brakeman about the passenger's dog, which the brakeman was trying to remove from the car. The passenger, a powerful lumberman, slammed the brakeman down into a seat, and, as the passenger turned away to resume his seat, the brakeman struck him over the head with a poker. Held, that the company was liable. Hanson v. Railway Co., 62 Me. 84. A railroad company is liable for

This liability also extends to assaults made by the porter of a sleeping car. Thus, where a passenger on a railroad train asks permission of the porter of a sleeping car to enter it for the purpose of washing his hands, and the porter without excuse commits a violent assault on the passenger, knocking him senseless, the railroad company is liable.[6] So, the Pullman Palace-Car Company has been held liable for an indecent assault on a female passenger, committed by its porter.[7]

A street-railway company is liable for the act of its driver, who refuses the tendered fare of a passenger, strikes him, knocks him off the car, where he is run over, and receives injuries of which he dies.[8]

an assault on a passenger by a brakeman, growing out of an altercation caused by the brakeman's refusal to permit the passenger to pass to another car to get his baggage as the train was approaching a station; there being no rule of the company prohibiting a passenger from going from one car to another on all proper occasions. Atlanta & W. P. R. Co. v. Condor, 75 Ga. 51.

6 Williams v. Car Co., 40 La. Ann. 417, 420, 4 South. 85.

7 Campbell v. Car Co., 42 Fed. 484, affirmed by divided court, 154 U. S. 513, 14 Sup. Ct. 1151. Owing to a washout, it became necessary to transfer passengers from one train to another. Plaintiff, a passenger entitled to ride on a sleeper, was put in an ordinary car by the porter of the first train. Plaintiff thereupon requested the porter to return his sleeping-car tickets, or procure him something to show that he was entitled to ride in the sleeper. The porter refused so to do, and turned to go away, when plaintiff touched him lightly on the arm, saying he must not leave without some satisfaction, whereupon the porter knocked plaintiff down. Held, that the question whether the porter was acting in the performance of his duties as an agent of the railroad company when the blow was struck was one of fact for the jury, and that it was error to dismiss the complaint. Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. 319.

8 Winnegar v. Railway Co., 85 Ky. 547, 4 S. W. 237. A driver of a street car beat a trespassing newsboy, when the passengers inter-

The same principle applies in all its strictness to carriers by water. Thus, a carrier by steamboat is liable for an assault on a passenger by the engineer,[9] or by the mate,[10] whether or not they were acting within the scope of their employment.[11] Nor can a common carrier escape liability for injuries to a passenger on his steamboat, caused by the quarrelsome, violent, and fighting crew, by showing that men of that class are usually employed for such work.[12]

The carrier's liability is not confined to assaults committed by his servants, but it extends also to insults, threats, and other disrespectful conduct. Thus, a street-railway company is liable for the act of its driver in falsely charging a passenger, in the hearing of others, with passing counterfeit money in payment of fare,

fered. The driver then abused the passengers, and finally entered the car, and assaulted one of them. Held, that the company was liable. Stewart v. Railroad Co., 90 N. Y. 588.

9 White v. Railroad Co., 115 N. C. 631, 20 S. E. 191.

10 Springer Transp. Co. v. Smith, 16 Lea (Tenn.) 498, 1 S. W. 280.

11 A passenger on a steamer was accused by the steward and several waiters with not having paid for a meal. He replied that he had, but that rather than have any trouble he would pay it again. One of the waiters then ordered him into his berth, whereupon plaintiff, a fellow passenger, said: "I do not think they have any right to order you into your berth until you get ready to." The steward and the waiters thereupon turned on plaintiff, assaulted him, knocked him down, and injured him severely. Held, that the steamboat owners were liable. Bryant v. Rich, 106 Mass. 180. After collecting fare from a boy who was a passenger on a steamer the clerk charged him with having hidden under the boiler. The boy denied the charge, and the clerk assaulted him, inflicting on him severe injuries. Held, that the owners of the boat were liable. Sherley v. Billings, 8 Bush (Ky.) 147, 154.

12 Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527.

and in threatening him with arrest.[13] So, if the master of a vessel forcibly drives the passengers out of the cabin, if he compels them to lodge with the common hands, if, by his indecency, rudeness, or brutality, he shock the modesty of a female passenger, so as to oblige her to quit the cabin, or as to render the passage comfortless by a continued series of vexation, misery, and torment, both he and his employers are liable.[14]

§ 367. SAME—JUSTIFIABLE ASSAULTS.

If an act of an employé be lawful, and is one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor. Hence, where a passenger, with an open knife in his hand and in a threatening manner, approaches the conductor, the company is not liable for the conductor's act in shooting and wounding the passenger to protect himself from an apparently imminent danger. And the fact that the conductor may have been in no actual danger does not render the company liable if he acted in honest and reasonable belief of immediate danger. "An employé has not forfeited his right of self-defense by assuming service with a common carrier; nor does a common carrier engage aught

[13] Lafitte v. Railroad Co., 43 La. Ann. 34, 8 South. 701. But in Parker v. Railway Co., 5 Hun, 57, it was held that a conductor is not in the discharge of his duty when he uses insulting language to a passenger who failed to get off at his station, owing to the failure of the train to stop there, and the company is not liable therefor.

[14] Keene v. Lizardi, 3 La. 273. Vessel owners are responsible for the master's excluding a cabin passenger from the use of the cabin. St. Amand v. Lizardi, 4 La. 244.

against the exercise of that right by his employé. There is no misconduct when a conductor uses force and does injury in simple self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of employment in which the party is engaged." [1] So, it seems that the carrier is not liable for an assault committed by one of its servants on a passenger while the latter is tempting him to do some illegal act; as a sale of liquor in violation of law and of the company's orders.[2]

On the question whether the use of insulting and indecent language by a passenger to a servant of the carrier will relieve the carrier from liability for an assault committed by the servant in consequence thereof, the authorities are in conflict. The better rule would seem to be that it does. On this subject, the supreme court of New York [3] uses this language: "It may be true that the use of the abusive language to the driver

§ 367. [1] New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109. The conductor on a street car may push a passenger, who violently assaults him, off the car while it is in motion, without rendering the railroad company liable for the injury, if he has reason to believe at the time that this action is necessary for his protection. Hayes v. Railroad Co., 15 Mo. App. 583. Where a conductor makes two ineffectual attempts to get the ticket of a passenger asleep in his seat, and on the third attempt shakes him gently and pulls his ear, and the passenger then strikes and kicks the conductor, who returns no blows except in necessary self-defense, and uses no unnecessary force in removing the passenger, the railroad company is not liable as for an assault and battery by the conductor. Russell v. Railroad Co. (Sup.) 42 N. Y. Supp. 678.

[2] Cassedy v. Car Co. (Miss.) 17 South. 373.

[3] Scott v. Railroad Co., 53 Hun, 414, 6 N. Y. Supp. 382.

did not justify the assault, as far as the driver is concerned, in the eyes of the criminal law; but there is no reason for holding that where a passenger, by his own improper and insulting behavior while a passenger on the road of the railway company, brings upon himself an assault, the carrier should be responsible. Carriers are held to the strictest responsibility. They must treat their passengers respectfully, and protect them, so far as they reasonably can, from injury or insult on the part of their employés. But there is also a responsibility on the part of the passenger. He is bound to conduct himself in an orderly and decent manner; and if he forgets his obligations, and by his indecent behavior, and by the use of language which is morally certain to end in a personal encounter, he succeeds in his effort to bring about such a result, certainly the carrier cannot be bound to protect the passenger, under such circumstances, from the natural and probable results of his own acts. * * * The duties of the carrier and the passenger are reciprocal. The carrier is bound to protect the passenger, and the passenger, in order to entitle himself to such protection, is bound to behave himself in a decent and orderly manner." In a Georgia case [4] the facts were as follows: A disorderly passenger defied the conductor, and drew a pistol. The conductor then armed himself, and compelled the passenger to leave the car at the point of a pistol.

[4] Peavy v. Banking Co., 81 Ga. 485, 8 S. E. 70. In an early Ohio case it was also held that a carrier is not liable where an assault by his servant is provoked by the abusive language of the passenger. Little Miami R. Co. v. Wetmore (1869) 19 Ohio St. 110.

When the passenger reached the ground, he used grossly vituperative, obscene, and insulting language to the conductor; and the latter shot at him, hitting him in the shoulder. A duel then ensued, in which the passenger was shot three times. It was held that though the conductor, excited by danger and irritated by insult, was not fully excusable for the shooting, yet the railroad company was not liable for the consequence, since it was plaintiff's own act that unfitted the conductor from exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty. The court said: "The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune."

There are several cases, however, in which a contrary conclusion has been reached. In a recent Maryland case [5] it was held that the use of foul and abusive language by a passenger towards a conductor, and accusing the latter of stealing from the company, will not justify the conductor in striking him with his fist and lantern; nor does such provocation terminate the relation of passenger, so as to free the company from liability for such assault. The court said: "A conductor of a train, doubtless, has his patience and forbearance severely tested at times, but he must not settle his own personal difficulties with passengers while they are such, any more than he should permit others

[5] Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560.

to do so if he could avoid it. If he has an opportunity to prevent an assault on a passenger in his charge, it is his duty to do so; and his failure to make a reasonable effort to protect the passenger from such assault would make the company responsible. If that be a correct statement of the law, as it undoubtedly is, then, a fortiori, the company must be liable if the conductor makes an assault on one who is still a passenger." So, in an Illinois case [6] it has been held that a railroad company is liable for an assault by a brakeman on a passenger, provoked by the passenger's accusation that the brakeman had stolen his watch.

No doubt, where the insulting language of the passenger is provoked by the carrier's servant, who thereupon commits an assault, the carrier is responsible.[7] In such a case it cannot be successfully claimed that the servant immediately abandons his employment, and commences the attack solely in his personal capacity.[8] So, the fact that the passenger had on some previous occasion used slanderous and indecent language about a female relative of the conductor does not relieve the company from liability for an assault by the conductor. Such slanderous statements are not even admissible in evidence in mitigation of damages,

[6] Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 9 Ill. App. 250. The fact that a dispute occurred between plaintiff and the conductor as to whether plaintiff had paid his fare, and that plaintiff called the conductor a liar, does not justify an assault on plaintiff by the conductor, and the company is liable for injuries inflicted in such assault. Coggins v. Railroad Co., 18 Ill. App. 620.

[7] Wise v. Railway Co. (Ky.) 34 S. W. 894.

[8] Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440.

unless it appears that this was the first meeting after the conductor had been informed thereof.[9]

§ 368. SAME—WHEN TERMINATES.

This absolute liability of the carrier for the torts of his servants terminates when the relation of passenger and carrier terminates. After a passenger has alighted from the train, and left the station house to sell his wares as a peddler, the company is not liable for an assault on him by one of its sectionmen, acting under the belief that he is a spotter and a spy of the company.[1] It is sometimes, however, a very close question whether or not the relation has ceased, within the meaning of this rule. A street car stopped at the company's barn before it had reached a passenger's destination. The passenger left the car, and, while waiting for another on the public street, got into an altercation with the conductor about the failure of the car to go through, and the conductor assaulted him. It was held that the company was not liable, because it had no control over the place where plaintiff was, and owed him no duty to protect him there from assaults.[2] But it has

[9] East Tennessee, V. & G. Ry. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778.

§ 368. [1] Krantz v. Railway Co., 12 Utah, 104, 41 Pac. 717.

[2] McGilvray v. Railway Co., 164 Mass. 122, 41 N. E. 116. A passenger who had been insulted by a street-car driver left the car when the company's office was reached, and before his journey was completed, to report the driver, with the intention of resuming his journey on the same car, which was about to stop for a change of horses. The driver, seeing him go towards the office, intercepted him before he got there, and violently assaulted him. Held, that when the as-

been held that a railroad company is responsible to a passenger for a battery committed first in the car, arising from the passenger's delay in paying his fare, and repeated shortly afterwards at the office of the company, whither the passenger had gone to make complaint to the superintendent.[3] So, where a passenger on a street car leaves it because he is insulted and abused by the driver, and is pursued and beaten by the driver in the street, it must be regarded as one continuous wrong, and the railway company is as much liable as if the beating had taken place in the car.[4]

§ 369. INDEPENDENT TORTS OF SERVANT.

Under no test is a master liable for an independent tort of the servant, causing injury to a person to whom the master does not owe a special duty of care and protection.

Before a master can be held liable for the wrongful acts of his servants, it must be made to appear, not only that the relation of master and servant subsisted, but that the act of the servant which occasioned the injury was done in the course of his employment. The mas-

sault was committed the contract of carriage had ceased, and that the company was not responsible. Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709. This is certainly a doubtful case. So in Eads v. Railway Co., 43 Mo. App. 536, where it was held that if a passenger was struck on the head with a bell register by the carrier's servants while being ejected from the car, or as the final exertion or effort to get him off, the carrier would be liable, but not if he was struck after his expulsion was completed.

[3] Savannah St. & R. R. Co. v. Bryan, 86 Ga. 312, 12 S. E. 307.

[4] Wise v. Railway Co., 91 Ky. 537, 16 S. W. 351.

ter is not liable for the acts of the servant which are not connected with service which the servant had been employed to perform. In order that the master may be held liable, the act causing the injury must pertain to the duties which the servant was employed to perform. Hence a railroad company is not liable for injury to one struck by a drill, thrown from a car by a baggageman, which was regularly carried by him gratuitously for plaintiff without the company's knowledge.[1] So, if a servant of the company, while accomplishing some purpose of his own, without the scope of his duties, injures a trespasser, the company is not liable.[2] The obligation of a sleeping-car company for injury to a stranger who enters the car to ask the privilege of washing his hands, and is there, wantonly and without provocation, assaulted and beaten by the porter of the car, is not governed by the principles regu-

§ 369. [1] Walker v. Railroad Co., 121 Mo. 575, 26 S. W. 360.

[2] Alabama G. S. R. Co. v. Harris, 71 Miss. 74, 14 South. 263. Plaintiff took passage on a freight train, not intended for passengers, under an agreement with the trainmen by which he was to work his way. After the train had proceeded part of the way, and he had rendered some service, a brakeman collected part of his fare, and forcibly attempted to take money from his pocket. In the struggle which ensued, plaintiff fell or was pushed from the running train, and was injured. Held, that he could not recover from the railroad company. "It is true that even a trespasser on a train must not be knocked off by the servant of the company engaged about the master's business in putting him off; but that rule has no application here, where the plaintiff suffered injury from his own comrades, engaged, not in serving the railway company or about its business, but illegally engaged in a scheme of their own, in violation of duty to the company, participated in by the plaintiff." Alabama & V. Ry. Co. v. McAfee, 71 Miss. 70, 14 South. 260. See, also, ante, § 359.

lating the liability of common carriers, under the contract of carriage, for like assaults committed by their servants on passengers. The obligation of the company in such a case, being independent of any contractual relation, is governed by the general principles of the law of master and servant common to all systems of law, and formulated in the Louisiana Civil Code as extending to all "damages occasioned by their servants in the exercise of the functions in which they are employed." [3] So, where the conductor of a freight train, on discovering that a car has been broken open, and believing it to have been done by a trespasser on the

[3] Williams v. Car Co., 40 La. Ann. 87, 3 South. 631. A fireman placed the end of a hose in the pocket of plaintiff, who was riding on the engine. The engineer, for amusement, turned hot water into the hose, thinking it was cold water. Held, that the acts of the engineer and fireman were not in the real or apparent scope of their duty, and that the company was not liable for the scalding of plaintiff. "The distinction lies in this: That if the act done—that is, the discharge of the hot water—was one authorized to be done by the servants, and was at the time being done in the discharge of their duty as such servants, then the master would be responsible for the consequences to the plaintiff, although the servants might, in the discharge of their duty, maliciously and mischievously have thrown water on the plaintiff. It cannot be said that the act of putting the water upon the plaintiff must have been authorized by the master; but it is the act itself of discharging the hot water that must have been done in the course of the employment of the servant, and for the purpose of forwarding the business of the master. It does not matter that the servant might have used the same appliances in the discharge of a duty to the master; but the question definitely and distinctly presented is, was the servant in the particular case in the discharge of his duty?" International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517, reversing 30 S. W. 470. A railroad company is not liable for the act of one of its brakemen in kicking a person running along with the train, but making no effort to board it. Such

train, coolly walks up to him as he is standing quietly at the station, saying and doing nothing, and shoots him down without a word, the company is not responsible, since the act is murder, entirely beyond the scope of any employment or function of the conductor.[4] So, the acts of a conductor in stopping his train, pursuing, with a pistol in his hand, a boy into his father's house, seizing the boy, and carrying him off on the train, are not within the scope of his apparent authority; and the company is not liable unless it commanded, authorized, or ratified them.[5] So, a railroad company is not liable for injuries to a person on its station platform, caused by the explosion of torpedoes placed underneath the car wheels on a fourth of July by one of its firemen.[6]

§ 370. CONTRACTS OF AGENTS.

The general rule is that a principal is liable on contracts made by his agent if the latter acted within the scope of his apparent authority. Thus, a general passenger agent, who has general supervision over the company's passenger business, may bind the company by a contract for the transportation of excursionists, though he had no real authority to enter into the par-

an act is not only willful and intentional, but plainly outside the general limits of his duty, and without the line of business he was employed to do for the company. Molloy v. Railroad Co., 10 Daly (N. Y.) 453. A railroad company is not liable for injuries to an escort of a passenger who was accidentally pushed from the train by one of defendant's servants. O'Neil v. Railroad Co., 2 Ohio Cir. Ct. 504.

[4] Candiff v. Railway Co., 42 La. Ann. 477, 7 South. 601.

[5] Gilliam v. Railroad Co., 70 Ala. 268.

[6] Chicago, B. & Q. R. Co. v. Epperson, 26 Ill. App. 72.

ticular contract, unless notice of his lack of authority was brought home to the other contracting party.[1] So, a contract of shipment to a point beyond the company's line, signed by its station agent, who admitted that he had been issuing bills of lading to points beyond the company's line, is binding on the company, though it has given written instructions to him not to make such contracts.[2] But a conductor on a branch road, taking up tickets, and giving information to passengers, represents the company as to his own route, but does not represent the company in giving information as to the running and operation of the trains on the main line, with which he has no employment; and hence the company is not bound by the conductor's statement to a passenger that a fast train would stop at his destination, when, as a matter of fact, it does not do so.[3] Neither a con-

§ 370. [1] Houston & T. C. Ry. Co. v. Hill, 63 Tex. 381.

[2] Gulf, C. & S. F. Ry. Co. v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391. Representations of the agents of a steamship company, in response to inquiries by passengers, that a certain vessel of their line, sailing from a cholera infected port, would not carry steerage passengers, is within the scope of their apparent authority to give information to passengers, and the steamship company is liable for all injuries sustained by a passenger proximately resulting from the falsity of such representations. The Normannia, 62 Fed. 469, 479.

[3] Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54. A passenger, whose destination was a point beyond the company's road, boarded a train without buying a ticket. He told the conductor his destination, and was informed that the fare was $3.10, which in reality was the fare to the last station on the company's road, and paid that sum under the belief that it was the fare to destination, and the conductor did not undeceive him. The connecting carrier refused to carry him, without payment of fare for the distance over its road, and he was ejected. Held, that in the absence of testimony that the first carrier authorized its conductor to collect fares for points

ductor, station agent, road master, nor solicitor of a railway company is authorized, in ordinary cases, to contract for surgical attendance upon a passenger or employé injured in operating the trains of the railway company, so as to bind the company.[4] A general superintendent, however, has authority to employ surgeons to give attention to persons injured by the trains of the

beyond its line, or of any usage or facts from which such authority could be implied, the passenger could not recover, under the general principle that an agent, to bind his principal, must act within the scope of his agency. Haggerty v. Railroad Co., 59 Mich. 366, 26 N. W. 639. A railway company entered into a contract for the construction of its road, binding itself to furnish a construction train to be used in carrying material for laying and ballasting the road, which train was in charge of its own employés. Held, that the company was not liable for injuries, caused by the negligence of the train hands, to one of the contractor's employés, who got on the train with the conductor's permission, to be carried from the place of work to his home. The contract of the company was to carry materials only, and not passengers, and the conductor, in permitting the employé to get on the train, was not acting as the company's agent. Graham v. Railway Co., 23 U. C. C. P. 541; Sheerman v. Railway Co., 34 U. C. Q. B. 451.

[4] St. Louis, A. & T. Ry. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092; Peninsular R. Co. v. Gary, 22 Fla. 356; Toledo, W. & W. R. Co. v. Rodrigues, 47 Ill. 188; Tucker v. Railroad Co., 54 Mo. 177; Brown v. Railroad Co., 67 Mo. 122; Atlantic & P. R. Co. v. Reisner, 18 Kan. 458; Cooper v. Railroad Co., 6 Hun, 276; Cox v. Railway Co., 3 Exch. 268. But it has been held that where such injury is done at a point distant from the chief offices of the company, and there is urgent necessity for the employment of a surgeon to render professional services to an injured employé, the conductor, if he is the highest agent of the company on the ground, has the authority to bind the corporation by the employment of a surgeon to render the services required by the emergency. Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358. A division superintendent has no implied authority to hire a physician to attend passengers injured by inevitable

company he represents; and a surgeon employed by that officer is not bound to institute an inquiry for the purpose of determining whether the injured man was hurt under such circumstances as rendered the company liable.[5]

accident, and not through any negligence of the company; and, to render the company liable for the physician's services, there must be evidence of an express authority. Union Pac. Ry. Co. v. Beatty, 35 Kan. 265, 10 Pac. 845.

[5] Cincinnati, I., St. L. & C. R. Co. v. Davis, 126 Ind. 99, 25 N. E. 878.

CHAPTER XXVI.

CONNECTING CARRIERS, AND LEASE AND OWNERSHIP OF RAILROADS AS AFFECTING CARRIER'S LIABILITY.

§ 371. Connecting Carriers—Liability of Carrier for Its Own Torts.
372. Same—Liability of First Carrier for Torts of Connecting Carrier.
373. Same—Partnership or Joint Management.
374. Same—Refusal to Honor Ticket.
375. Same—Rights and Liabilities as between Themselves.
376. Use of Another's Means of Transportation—Liability of Carrying Company.
377. Same—Liability of Track-Owning Company.
378. Same—Railroad and Sleeping-Car Companies.
379. Lease of Railroads—Liability of Lessee.
380. Same—Liability of Lessor.
381. Sale of Railroad.
382. Consolidation of Railroads.
383. Ultra Vires Defense.

§ 371. CONNECTING CARRIERS—LIABILITY OF CARRIER FOR ITS OWN TORTS.

A connecting carrier is not relieved from liability for injury to a passenger on its own road by the fact that the ticket was purchased from, and the contract of carriage was entered into with, another carrier.

By accepting a person as a passenger, a common carrier becomes subject to all the duties and liabilities as such, though the contract of carriage may have been entered into with another company. The right which a passenger by railway has to be carried safely does not

depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely.[1] At any rate, by accepting the passenger under these circumstances, the connecting carrier adopts the contract as its own. Thus, where a railroad ticket entitles a passenger to cross a harbor at his destination by ferry, and a coupon attached to the ticket is accepted in payment of his fare on the ferry, a municipal corporation which controls and manages the ferry is liable for injuries to the passenger caused by the negligence of the officers of the boat during the passage.[2]

§ 372. SAME—LIABILITY OF FIRST CARRIER FOR TORTS OF CONNECTING CARRIER.

By the weight of American authority, the liability of a common carrier terminates at the end of its line, and is not extended to that of another company by the sale of a ticket to a point on that line, in the absence of a special contract or a partnership arrangement between the two roads. But in England and in some of the American states the company issuing such a ticket is responsible for the safety of the passenger on the whole journey.

In this country it is generally held that the sale of a coupon ticket good over several connecting lines of rail-

§ 371. [1] Austin v. Railway Co., L. R. 2 Q. B. 442, 445, per Blackburn, J. See, also, Foulkes v. Railway Co., 5 C. P. Div. 169.

[2] Mayor, etc., of St. John v. Macdonald, 14 Can. Sup. Ct. 1, affirming 25 New Brunswick, 318.

way does not operate as a contract by the selling company to carry the passenger to his destination, but only to the end of its line, and to deliver him to the next carrier on the route beyond; and that, therefore, in such a case, the selling company is not liable for injuries to a passenger while transported on a connecting road.[1] "The obvious import of such a transaction is that the tickets, for passage upon roads beyond its own line, are sold by the first road as agent for the others. The obligations and responsibilities of a carrier of persons, over other roads than its own, are not thereby assumed, unless its relation to those roads, by contract or otherwise, is such as to confer, or, at least, to consist with, that character." [2] "This rule of liability," it is said by the supreme court of the United States, "is adopted generally by the courts of this country," and "is in itself so just and reasonable that we do not hesitate to give it our sanction." [3] It has accordingly been held that a railroad company which sells a ticket to a point beyond its line, which can be reached from the terminus of the railroad only by a stagecoach owned by another company, is not liable for an injury to the passenger while in the stagecoach, where there

§ 372. [1] Knight v. Railroad Co., 56 Me. 234; Nashville & C. R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341, 9 Heisk. (Tenn.) 852; Kerrigan v. Railroad Co., 81 Cal. 248, 22 Pac. 677.

[2] Hartan v. Railroad Co., 114 Mass. 44.

[3] Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136; citing Michigan Cent. R. Co. v. Mineral Springs Manuf'g Co., 16 Wall. 318, 324; Railroad Co. v. Pratt, 22 Wall. 123, 129; Myrick v. Railroad Co., 107 U. S. 102, 107, 1 Sup. Ct. 425.

is no participation in the profits between the two companies.[4]

In England a different rule prevails. It is there held that a railway company issuing a ticket to a passenger for a journey partly on its own line, and partly on the line of another company, may be, and presumably is, responsible for the safety of the passenger on the whole journey, and is liable to compensate him for injuries caused to him by the negligence of railway servants, or defective construction of carriages or stations, to whichever company they belong.[5] This rule seems to have been adopted, in all its length and breadth, in New Jersey. The sale of a ticket by a railroad company, good for a passage from one point to another, is an undertaking by the selling company that due care shall be used for the passenger's safety during the whole course of his journey over that and other roads, both in the management of the trains and the construction and maintenance of the lines in a condition fit for his passage over them. And this liability is not changed by leases and agreements between the companies having connecting lines, apportioning the charges, expenses, and fares between them, of which the passenger has no notice.[6]

It has been held in several states that a carrier may contract as principal for the conveyance of a passen-

[4] Hood v. Railroad Co., 22 Conn. 1; Poole v. Railroad Co., 35 Hun, 29.

[5] Great Western Ry. Co. v. Blake, 7 Hurl. & N. 987, 991; Thomas v. Railway Co., L. R. 5 Q. B. 226, L. R. 6 Q. B. 266; Foulkes v. Railway Co., 5 C. P. Div. 169.

[6] Little v. Dusenberry, 46 N. J. Law, 614.

ger over the whole route, including his own and that of connecting carriers; and such a contract may be established by the circumstances, notwithstanding the passenger receives tickets for the different lines signed by their separate agents.[7]

§ 373. SAME—PARTNERSHIP OR JOINT MANAGEMENT.

Where a partnership or joint interest exists between two railroads, both companies are liable to a passenger holding tickets good over both roads, who was injured during the journey.[1] Where a railroad company contracts to carry a party of excursionists over its own and another road for one lump sum, which it divides with the other company, the two companies are partners as to that transaction, and both companies are jointly and severally liable for any damages occasioned by the neglect of either in the performance of any duty of care imposed by law on carriers of

[7] Quimby v. Vanderbilt, 17 N. Y. 306; Williams v. Vanderbilt, 28 N. Y. 217, affirming 29 Barb. 491; Ward v. Vanderbilt, *40 N. Y. 70, 4 Abb. Dec. 521, affirming Williams v. Vanderbilt, 29 Barb. 491; Wheeler v. Railroad Co., 31 Cal. 46.

§ 373. [1] Wylde v. Railroad Co., 53 N. Y. 156. Where a Louisiana railroad company connects with another in Texas at a point on the boundary, and through trains are run on them, and the servants are employed for both roads, under a general manager who has charge of the entire line, both roads are liable to a passenger for transportation begun on the Texas road, and who was injured while on the Louisiana line. If there was not a partnership between the two roads, there was an arrangement by which they were to be operated as one line, with authority to its manager to make through contracts for the carriage of passengers. Howe v. Gibson, 3 Tex. Civ. App. 263, 22 S. W. 826.

passengers.[2] So, where station grounds are jointly used and maintained by two railroad companies, both are liable to a passenger on one of them injured by reason of a defective approach,[3] or by a failure to light the station grounds.[4] So, where two railroad companies employ the same ticket agent and use the same track, and it is customary for each company to accept the tickets of the other on its trains, both companies are liable to a passenger to whom the agent sold a ticket of one company, and whom he directed to get on the train of the other.[5] But where two connecting railroad companies use a station jointly, and hire one person to discharge the duties of ticket agent for both, and such agent sells a ticket for carriage over one of the roads, the other company is not responsible for the negligence of the road over which the ticket entitles the passenger to ride.[6] So, a ticket agent at a union station who is applied to for a ticket over a certain road acts as the agent of such road in receiving the fare and in issuing the ticket; and if, by mistake, he gives the passenger a ticket over another road, the latter is not liable to the purchaser for the agent's negligence or its consequences.[7]

An advertisement by a railroad company that it runs its trains, or connects with trains of other companies, so as to form through lines, without breaking bulk or

2 Collins v. Railway Co. (Tex. Civ. App.) 39 S. W. 643.

3 Gulf, C. & S. F. Ry. Co. v. Glenk (Tex. Civ. App.) 30 S. W. 278.

4 Wabash, St. L. & P. Ry. Co. v. Wolff, 13 Ill. App. 437.

5 Texas & P. Ry. Co. v. Dye (Tex. Civ. App.) 33 S. W. 551.

6 Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 23 Pac. 151.

7 Scott v. Railway Co., 144 Ind. 125, 43 N. E. 133.

transferring passengers, does not show any contract or agreement between the companies to share profits and losses, so as to render the advertising company liable for losses on the others. Such arrangements are required for the accommodation of the public, as well as the convenience of the roads themselves.[8] Nor does the fact that one railroad company owns stock in another show a partnership, or agreement to run the two roads on common account.[9]

§ 374. SAME—REFUSAL TO HONOR TICKET.

In the absence of any arrangement between connecting carriers, there is no obligation on the part of either to honor passenger tickets issued by the other.[1] The wrongful act of a ticket agent in selling a ticket purporting to be good over the line of a connecting road will not render the connecting road liable for refusing to honor the ticket, and for ejecting the passenger, where it has never held out such ticket agent as its employé.[2]

But where there is an arrangement between connecting carriers to honor tickets issued by each other, the

[8] Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136; Hartan v. Railroad Co., 114 Mass. 44.

[9] Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136.

§ 374. [1] Oregon S. L. & U. N. Ry. Co. v. Northern R. Co., 51 Fed. 465; Matthews v. Railroad Co., 38 S. C. 429, 17 S. E. 225.

[2] Houston & T. C. R. Co. v. Ford, 53 Tex. 364. An agreement between two connecting railroad companies authorizing one of them to sell tickets over the line of the other in one direction does not authorize it to sell tickets good for the opposite direction; and the holder of such a ticket cannot demand transportation over the connecting line. Anderson v. Railroad Co., Fed. Cas. No. 360.

connecting carrier will be liable for its refusal to honor a ticket good over its line issued by the other company.[3] The fact that conductors have been in the habit of honoring tickets issued by a connecting road is evidence of such an arrangement;[4] and so is the fact that such a ticket has been honored by several conductors before it was objected to.[5] So, where a passenger purchases a coupon ticket, without notice of the fact that the connecting carrier has notified the first carrier to discontinue the sale of such tickets, the connecting carrier has no right to eject the passenger from its train.[6] Where a passenger has purchased such a coupon ticket in good faith, from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation. They are bound by the statements and agreements expressed in the ticket, made by the agent selling it, as to its time limit and stop-over privileges.[7]

It is generally held that a railroad company which, without authority, issues a ticket purporting to be good over the line of a connecting carrier, is liable for the refusal of the connecting carrier to honor the ticket.[8]

[3] Lundy v. Railroad Co., 66 Cal. 191, 4 Pac. 1193.

[4] Spencer v. Lovejoy, 96 Ga. 657, 23 S. E. 836.

[5] Young v. Railroad Co., 115 Pa. St. 112, 7 Atl. 741.

[6] Pennsylvania R. Co. v. Connell, 112 Ill. 295. This decision is doubtful, because it would seem that a railroad company has an absolute right to refuse to honor tickets over its line issued, without its consent, by another company.

[7] Young v. Railroad Co., 115 Pa. St. 112, 7 Atl. 741.

[8] Central R. R. v. Combs, 70 Ga. 533; Cherry v. Railroad Co., 61 Mo. App. 303; Hudson v. Railway Co., 9 Fed. 879; Thomas v. Mills,

By selling such a ticket, the railroad company undertakes that the coupon will be recognized and honored by the road over whose line it purports to give a right of transportation. The rule that a railroad company which sells a coupon ticket good over its own and connecting lines does not undertake to carry beyond its own line has no application to such a case. So, a carrier contracting for passage over its own and a connecting line, having agreed to reserve a stateroom on such connecting line, is liable in compensatory damages to the purchaser of a through ticket who was unable to secure his stateroom on the connecting line by reason of the fact that there were more tickets sold than staterooms reserved.[9]

But the supreme court of Illinois has held that a railroad company which sells to a ticket broker several thousand tickets, good over its own and a connecting line, is not liable for the refusal of the connecting line to honor the tickets, after it has passed into the hands of a receiver. In selling the tickets, the selling company acted really as agent for the connecting line, and was not liable for the latter's failure to perform the contract, nor did it impliedly undertake that the coupons should be honored by its principal.[10]

4 E. D. Smith (N. Y.) 75. A railroad company selling a ticket over a connecting road, which by mistake of its ticket agent fails to designate the place of destination, is liable for the act of one of its servants at the connecting station, in refusing the passenger admittance to the connecting train. Griffin v. Railroad Co., 41 Hun (N. Y.) 448.

[9] Bussman v. Transit Co., 71 Fed. 654; Id., 9 Misc. Rep. 410, 29 N. Y. Supp. 1066.

[10] Chicago & A. R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861, reversing 59 Ill. App. 479. It is certainly a startling proposition of

§ 375. SAME—RIGHTS AND LIABILITIES AS BETWEEN THEMSELVES.

The numerous arrangements subsisting in this country between railroad companies for through traffic rest on the voluntary consent of the various railroads. A court of equity has no power, either at common law or under the interstate commerce act, to compel a railroad company to enter into a contract with another company for a joint through rate and joint through routeing of freight and passengers.[1] But in many of the states railroad companies are required by statute to so run their trains as to facilitate the transfer of freight and passengers at the intersection with other railroads.[2]

In some cases, a carrier which has been compelled to pay a judgment obtained against it by one of its passengers may recover the amount from another carrier, which, as between themselves, is primarily liable therefor. Thus, where a stage company, a common carrier of passengers, employs, as part of its route, a ferry, owned by another person, across the Mississippi river, the ferry owner must respond to the stage company for damages which it is compelled to and does pay for in-

law that a railroad company which issues a ticket purporting to be good over its own and a connecting line does not impliedly undertake that the ticket shall be honored by the connecting line. Such a rule would leave one who has purchased a ticket good over a connecting line entirely without a remedy, if issued without authority from the connecting carrier.

§ 375. [1] Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 559.

[2] Gen. St. Conn. 1888, § 3529; Gen. St. Kan. 1889, par. 1212.

juries to a passenger on its stage, caused by the negligence of those in charge of the ferry while the stage is in their possession for the purpose of carriage over the river.[3] But a connecting carrier which has employed excessive force in ejecting a person traveling on a ticket wrongfully issued by another company cannot recover from the selling company the amount of a judgment rendered against it for the ejection. The use of excessive force was its own wrong.[4]

§ 376. USE OF ANOTHER'S MEANS OF TRANSPORTATION—LIABILITY OF CARRYING COMPANY.

In England and in most of the states of this country, a railroad company which issues a ticket for a journey in the course of which its own train or cars pass over a track owned by another company is responsible, as common carrier, for the safety of the passenger throughout the entire journey. But, in some of the American states, the liability of the carrying company does not extend beyond its own track.

In England, the rule stated in the black-letter text is perfectly settled. "Where a railroad company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers pursuant to an act of parliament, or whether it be under any particu-

[3] Blakeley v. Le Duc, 19 Minn. 187 (Gil. 152). See, also, ante, p. 517.

[4] Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co., 157 U. S. 225, 15 Sup. Ct. 576.

lar contract for a participation in profit or otherwise), the contract between the railroad company and the traveler to whom such ticket is issued is, upon every principle of law, a contract, not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other." [1] This rule, though it seems to be somewhat at variance with some of the cases under connecting carriers, also prevails in most of the American states. "A railroad company which enters into a contract with another company, giving it the right to operate its trains over the track of such other company, must see and know that the track is in good and safe condition, and that the trains of the other company are so ordered as not to interfere with the full discharge of its own duty to its passengers, because such trains

§ 376. [1] Thomas v. Railroad Co., L. R. 5 Q. B. 226. L. R. 6 Q. B. 266; Great Western Ry. Co. v. Blake, 7 Hurl. & N. 987. Defendant railway company operated its trains between two stations over the track of another company, by virtue of statutory powers, and the profits of the traffic between the two points were divided between the companies. Plaintiff purchased a round-trip ticket between the two points from the track-owning company, but traveled in a train owned and operated by defendant. Owing to the carriage being unsuited to its platform at the point of destination, which belonged to the track-owning company, plaintiff sustained injury in alighting. Held, that defendant was liable, though no contract existed between it and plaintiff, since, having accepted plaintiff as a passenger, it was its duty to provide safe means of alighting. Foulkes v. Railway Co., 5 C. P. Div. 157. Where a passenger is carried on a railroad which enters a station over the line of another road, the carrying company is liable for an accident occurring because of a misplaced switch which was under the supervision of its own employés. Birkett v. Railway Co. (1859) 4 Hurl. & N. 729.

would be a danger against which it is bound to provide." [2] One of the leading American cases on this subject is McElroy v. Nashua & L. R. Corp.,[3] where it was held that a railroad company is responsible to one of its passengers for injuries sustained through the mismanagement of a switch on its road, though the per-

[2] Murray v. Railroad Co., 66 Conn. 512, 34 Atl. 506. The defendant, by contract, ran its trains for about a mile over the tracks of another company, subject to the latter's control and direction. A passenger on defendant's train jumped therefrom to escape an imminent collision between it and a train of the other company. Held, that the operatives of such train were to be regarded, for the purposes of the case, as the servants of defendant, and that it was liable for their misconduct, and that it was immaterial that a bitter feeling existed between them and the employés on its own train on account of a labor strike. To the same effect see Id., 34 Atl. 506. A railroad company is held to the exercise of due care for the safety of all persons while exercising its franchises, whether on its own road or that of another company. This duty was imposed by law when it received its franchises, which holds good in all times and in all places; and if the company operates its trains over the road of another, by contract or lease, it must see and know that the track is in a good and safe condition, not only for the safety of its passengers, but also for the safety of persons rightfully near the track, and liable to injury by its being used when in an unsafe condition. Wabash, St. L. & P. Ry. Co. v. Peyton, 106 Ill. 534. Though a railroad company is not the owner of the cars or the track on which it receives a passenger, and though the employés making up the train are not its employés, yet if the use of the car and the track, and the labor in making up the train, are all to enable it to exercise its functions and perform its duties as a common carrier, the car and the track, and the servants employed in making up the train, are to be regarded as its cars, tracks, and servants, so far as the rights of the passenger are concerned; and it is liable for injuries caused through the negligence of such servants in making up the train. Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219, 233; Id., 11 Ill. App. 386.

[3] 4 Cush. 400.

son operating the switch was employed by another road, and though the switch was built by that company to connect its road with that of defendant.[4] So a railroad company which sells a passenger a ticket to a point

[4] A railroad company operating its train over the track of another company is not relieved from liability for injury to one of its passengers, caused by its negligence concurring with that of the other company, by a statute defining the liability of the companies among themselves for injuries happening on the road so used in common. Eaton v. Railroad Corp., 11 Allen (Mass.) 500. If a passenger, in a railroad car standing on a side track, is injured by the car being struck by the car of another company, through the negligence of a brakeman in the employ of such company, in connecting the two cars for the purpose of carrying out a contract between the corporations for their joint benefit, an action may be maintained by the injured person against the corporation owning the car on which he is a passenger. White v. Railroad Co., 136 Mass. 321. See, also, Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. 103. A railroad company which sells a ticket good to a particular station is liable for injuries to the passenger, inflicted through the negligence of the servants of another company with whom the carrier company has contracted for the motive power. Keep v. Railroad Co., 10 Fed. 454, 9 Fed. 625. A railroad company selling a ticket over its own and a connecting line, which connecting line is merely the means of reaching the real terminus of its road, and to which its train is transferred, must be held responsible for any negligence during the transfer, whether by the acts or omissions of its own immediate servants, or those of the connecting line by which it causes its train to be so transferred. Chicago & A. R. Co. v. Gates, 61 Ill. App. 211. Where, by an arrangement between two railroad companies, the trains of one are run over the tracks of the other, and regularly stop at intermediate stations to receive and discharge passengers, to whom tickets bearing the names of both companies are sold in the usual way by the track-owning company's ticket agent, the proceeds being divided between the two companies, the track-owning company will be deemed the agent of the other in issuing the tickets, and the latter is bound to accept them. Pittsburgh, C., C. & St. L. Ry. Co. v. Berryman, 11 Ind. App. 640, 36 N. E. 728.

beyond its own line, and which places her in a car, and transports her to her destination without change of cars, is liable for injuries sustained by the negligent starting of the train while attempting to alight.[5] So, where a stagecoach company uses a ferry as part of its route, the ferry company must be considered as the agent or servant of the stage company, so as to render the latter liable for injuries to a passenger on a coach,

[5] Chollette v. Railroad Co., 26 Neb. 159, 41 N. W. 1106. A railroad company which agrees to run an excursion train to a point beyond its own lines, and sells tickets to that point, is liable for injuries to a passenger while the train is on the track of the connecting carrier, caused by the negligence of the connecting carrier's servants. Washington v. Railroad Co., 101 N. C. 239, 7 S. E. 789. A railroad company which advertises an excursion to a city that can be reached only over the line of a terminal association, but which treats the city as one of the stations on its road, is responsible for an injury to a passenger while the train is being hauled by the terminal association over its tracks to the city. Chicago & A. R. Co. v. Dunser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93. It is the duty of a railroad company using a platform in a depot belonging to another company to see that the platform used is safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with such other company; and if ice on the platform is dangerous to passengers getting on and off the cars, the company is liable, whether or not the ice was placed there by its own servants. Seymour v. Railway Co., 3 Biss. 43, Fed. Cas. No. 12,685. In Pennsylvania, the state at one time owned a railroad, and the motive power used to operate trains thereon. The cars and rolling stock, however, were owned by private individuals, and persons desiring to travel over the road entered into contracts with these private individuals. The state furnished the servants who controlled the motive power, and also appointed an agent to collect from passengers tolls due the state. Held, that the private individuals operating the cars were liable for injuries to passengers caused by the negligence of the state's agents. Peters v. Rylands, 20 Pa. St. 497.

caused by the negligence of the ferry company while transporting it across the river.[6]

But some of the American courts have also applied to this class of cases the principle that a railroad company is not responsible for injuries to a passenger occurring beyond the end of its line. A carrier of passengers by railroad, who rightfully runs his cars upon the railroad of another, over which he has no control or right beyond that of running his own cars upon it, is not liable for injuries sustained by his passenger while upon that road, which are occasioned, without his fault, by the misconduct or negligence of the operatives of that road, over whom he had no control.[7]

A railroad company running its train over the tracks of another railroad is unquestionably liable for the negligence of its servants in running the train into one operated by the other company, killing a passenger on that train, though the servants of the other company may also have been negligent.[8]

[6] McLean v. Burbank, 11 Minn. 277 (Gil. 189).

[7] Sprague v. Smith, 29 Vt. 421. From the terminus of defendant's railroad, its trains were operated a distance of 30 miles over the track of the Missouri Pacific Railway Company, which used its own locomotive, furnished its own train crew, and had entire control of the train and train men while on its road. A passenger who had purchased a ticket from the Missouri Pacific Railway to a station on its railroad, over which it thus operated defendant's train, was killed by the premature starting of the train while in the act of alighting at destination. Held, that since deceased was not defendant's passenger, and since it had no control over the train hands, the mere fact that it owned the cars used by the Missouri Pacific Company in transporting him did not make it liable for his death. Smith v. Railway Co., 85 Mo. 418; Id., 9 Mo. App. 598.

[8] Chicago, R. I. & P. Ry. Co. v. Groves, 56 Kan. 601, 44 Pac. 629.

§ 377. SAME—LIABILITY OF TRACK-OWNING COMPANY.

A railroad company is no doubt responsible for injuries to its own passengers caused by the negligence of another company using its track; as, for instance, in cases of collision.[1] This certainly holds true where the other company uses the track without legislative authority; for, as we shall presently see, a railroad company cannot relieve itself from any part of its liability to passengers by a lease of its road made without legislative authority.[2] So, a railroad company which sells a ticket for a passage over its road, and which receives the passenger on a car operated and run by it, is liable for injuries to the passenger caused by the negligence of its employés, though the company

§ 377. [1] Illinois Cent. R. Co. v. Barron, 5 Wall. 90. A railroad company which permits the construction of an inclined track from a stone quarry down to, and partly on, the railroad line, is liable for the negligence of the quarryman operating cars on such inclined track, by which a passenger on the railroad is injured; and the fact that the negligent act which caused the injury was performed on the land of the quarryman is immaterial. The gravity road being built and operated partly on the land of the railroad by the quarryman, he was a licensee of the railroad, which became liable for the negligence of the quarryman and of his employés. Lynch v. Railroad Co., 8 App. Div. 458, 40 N. Y. Supp. 775. But in England it has been held that the track-owning company is not liable for an injury to one of its passengers in a collision caused solely by the disobedience of signals given by its servants to the employés of another company running a train over the road under statutory authority. Wright v. Railway Co., L. R. 8 Exch. 137.

[2] See post, § 380.

did not itself own the engine and cars.[3] A railroad company which charters a train to an association for an excursion for a lump sum is nevertheless bound to protect passengers on the train from insult and abuse, though the tickets are sold by the association, which had entire control of the excursion.[4]

As to the liability of a railroad company for injuries to passengers on the cars of another company while running over its road, the authorities are not quite uniform. The better rule would seem to be that a railroad company which permits another company to run trains over its track is liable to a passenger on such train for injuries sustained by reason of defects in the roadbed,[5] but not for injuries caused solely by the negligence of the carrying company's servants.[6] In an early New Hampshire case, however, it was held that a railroad company, by giving permission to another railroad to use part of its track, is under no duty to the passenger of the other railroad. The claim of such passenger, if injured, is on the company with whom he contracts.[7]

[3] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Id., 11 Ill. App. 386.

[4] Collins v. Railway Co. (Tex. Civ. App.) 39 S. W. 643.

[5] Schopman v. Railroad Corp., 9 Cush. (Mass.) 24; Stodder v. Railroad Co., 50 Hun, 221, 2 N. Y. Supp. 780, affirmed 121 N. Y. 655, 24 N. E. 1092. A railway company over which another has running powers is liable to a passenger on the other company's train for injuries sustained through the negligence of one of its own servants at a station owned by it, though on a platform entirely devoted to the business of another company. Self v. Railway Co., 44 J. P. 344.

[6] Clymer v. Central R. Co. of N. J., 5 Blatchf. 317, Fed. Cas. No. 2,912.

[7] Murch v. Railroad Corp., 29 N. H. 9.

§ 378. SAME—RAILROAD AND SLEEPING-CAR COMPANIES.

A railroad company which runs, as part of its train, sleeping cars owned by another corporation, is responsible to passengers in the sleeping cars, who have paid to the sleeping-car company an extra fare for the privilege of riding, for negligence in the construction of the car, and for the negligence of the employés of the sleeping-car company. The law will not permit a railroad company, engaged in the business of carrying passengers for hire, through any device or arrangement with a sleeping-car company whose cars are used by and constitute a part of the train of the railroad company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to carry.[1]

The duty of the sleeping-car company to its passengers has already been touched upon.[2] By the sale of a sleeping-car or a parlor-car ticket, the company ob-

§ 378. [1] Pennsylvania Co. v. Roy, 102 U. S. 451; Railroad Co. v. Walrath, 38 Ohio St. 461.

[2] See ante, § 205. The Pullman Company, by its mode of managing these sleeping cars, represents to the traveling public that they may be occupied with reasonable safety and comfort as sleeping cars; and, by receiving pay for the use thereof, the company agrees with its patrons that it will exercise ordinary care to secure the comfort and safety of those using the same for the purposes for which such cars are furnished. The person or persons placed in charge of such sleeping cars by the Pullman Company are bound, as employés of the company, to the exercise of ordinary care for the protection and comfort of persons using such cars in accordance with the regulation of the company; and if such person, either through failure to exercise proper care, or by willful misconduct on his part, permits or causes injury to happen to an occupant of the sleeping car placed under his

ligates itself to furnish a suitable car for the occupation of the passenger throughout the route indicated by the ticket, to furnish the passenger a continuous passage on such a car, according to the running time of the trains, and to furnish proper attendance. But the sleeping-car or parlor-car company is not liable for the failure of the railroad company to run its trains on account of a riot,[3] or for the failure of the railroad company to carry the passenger to destination.[4] The obligation of the palace-car company is to accommodate the passenger with a drawing-room only so long as the railroad company will haul it. So, where, by contract between a railroad company and a sleeping-car company, the railroad company is vested with the power to determine who shall be entitled to enjoy the accommodations of the sleeping car, and by what regulations the use of the car shall be governed, the sleeping-car company is not liable for the expulsion of a passenger from one of its cars by the conductor of the railroad company, on the ground that he did not have a ticket entitling him to ride in the sleeping car.[5] But it has been held that where a passenger holding a railroad ticket applies to the agent of a sleeping-car company

charge, the Pullman Company will be liable for the damages caused thereby. Campbell v. Car Co., 42 Fed. 484, affirmed by divided court, 154 U. S. 513, 14 Sup. Ct. 1151.

[3] Simms v. Car Co., 22 Fed. Cas. 159.

[4] Duval v. Car Co., 10 C. C. A. 331, 62 Fed. 265.

[5] Lawrence v. Car Co., 144 Mass. 1, 10 N. E. 723; Lemon v. Car Co., 52 Fed. 262. Where a passenger holding a second class ticket is ejected from a sleeping car by the employés of a railroad company, assisted by a servant of the sleeping car company, on the ground that the rules of the railroad company prohibit second class pas-

for a ticket for a sleeping berth, and exhibits his railroad ticket, the sleeping-car company will be liable to him for his ejection from the sleeping car by the railroad conductor on the ground that his railroad ticket does not entitle him to transportation over that line.[6]

§ 379. LEASE OF RAILROADS—LIABILITY OF LESSEE.

The lessee of a railroad is liable for all injuries resulting from the negligent operation and management of the road.

In the foregoing sections the respective liabilities of lessors and lessees of railroads have been to some extent touched upon. But in the cases there discussed there was a joint user of the tracks by the lessor and lessee, while in the cases now to be considered the entire control and operation of the road have passed from the hands of the lessor into those of the lessee.

Clearly, the liability of a common carrier of passengers is the same, whether he owns the means of transportation, or whether he has hired them from some third person. Thus, where a passenger is injured by the washing away of a railroad embankment, the fact that the carrier is the lessee of the railroad does not relieve it from the consequences of its own negligence; and it is bound to see that its road, whether owned or

sengers from riding in the sleeping car, the ejection is the act of the railroad company, and not of the sleeping car company. Pullman Palace Car Co. v. Lee, 49 Ill. App. 75.

[6] Pullman Palace Car Co. v. McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945.

leased, is safe and sufficient between the stations from and to which it undertakes to transport passengers.[1] So, a railroad company which hires stagecoaches to be run between a station and a neighboring village is liable for an injury to a passenger who was injured by the overturning of the stagecoach in which he was riding, with the intention of taking passage on a train at the station.[2]

§ 380. SAME—LIABILITY OF LESSOR.

A lease of a line of railway, made without legislative authority, is void; and the lessor will continue liable for the negligence of the lessee affecting the public, the latter being treated as operating the road as a mere agent of the lessor. By the weight of authority, the legislative consent to the lease is sufficient to relieve the lessor from this liability, and there need not be an express statutory exemption.

There is great unanimity of opinion that the lessor is liable for the negligence of the lessee in operating the railroad, if the lease is made without legislative sanction. The reasons for the rule, as generally stated, are as follows: (1) Where the power to sell or lease is not expressly conferred upon a quasi public corporation, it will not arise by implication. The enumeration of corporate powers, in such a case, implies the exclusion of all others not necessary to the reasonable enjoyment of those conferred. (2) The sell-

§ 379. [1] Philadelphia & R. R. Co. v. Anderson, 94 Pa. St. 351.

[2] Buffett v. Railroad Co., 40 N. Y. 168.

ing or leasing of a railway line is an abdication of the public duties imposed upon such corporation by law, and it is contrary to public policy that such duties should be abandoned, or imposed on another, without legislative sanction. This rule has been applied in numerous cases affecting passengers.[1] So, it has been held that where a railroad company, which has by its charter the right to own and operate steamboats, charters or lets a steamboat, manned by its own officers

§ 380. [1] Arrowsmith v. Railroad Co., 57 Fed. 165; Peoria & R. I. R. Co. v. Lane, 83 Ill. 448; Pennsylvania Co. v. Ellett, 132 Ill. 652, 24 N. E. 559; Central Railroad & Banking Co. v. Phinazee, 93 Ga. 488, 21 S. E. 66; Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853; Abbott v. Railroad Co., 80 N. Y. 27; Fisher v. Railway Co., 39 W. Va. 366, 19 S. E. 578; Ricketts v. Railway Co., 33 W. Va. 433, 10 S. E. 801; International & G. N. Ry. Co. v. Underwood, 67 Tex. 589, 4 S. W. 216; International & G. N. Ry. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; Bouknight v. Railroad Co., 41 S. C. 415, 19 S. E. 915; Washington, A. & G. R. Co. v. Brown, 17 Wall. 445. In an action against the owner of a railroad for negligence in its operation, a prima facie case is made out by proof that defendant is the owner of the road, without proving that the persons in charge were his servants or employés. It is not necessary for plaintiff to show that the owner of the road had not leased it, or had not, in some other way, given the entire control, management, and operation of it to another person. A railroad in operation differs in some respects from ordinary property; and we cannot see that its admitted owner can be injured by the inference, in the absence of proof to the contrary, that he is operating it. Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545. A railroad company leasing a train and train hands to another person for the purpose of running an excursion is liable for injuries caused by such person's misconduct in forcibly excluding from the train one who has purchased a ticket from the company. Chesapeake & O. R. Co. v. Osborne (Ky.) 30 S. W. 21. In some states, statutes make the lessor and lessee of a railroad jointly liable upon all rights of action arising out of the operation and maintenance of the road. Rev. St. Ohio 1890, § 3305.

and crew, under its pay, to the managers of an excursion, it is liable for injuries to a passenger resulting from the negligent or wrongful acts of its servants, unless it has transferred to the hirers the exclusive right to discharge the servants and employ others in their stead; and this is so, although the contract of carriage was between the passenger and the hirer; and it is immaterial that the boat was chartered to run to points not on the regular route of defendant.[2]

Several well-considered cases further hold that legislative permission to a railroad company to lease its road to another company will not absolve the lessor from liability for injuries to passengers inflicted by the lessee, unless such absolution is expressly granted by the legislature.[3] So, where a street railroad is made liable by its charter for any injury that any person may sustain by reason of the negligence or misconduct of its agents or servants, the fact that it thereafter, with the consent of the commonwealth, leases a portion of its road to another company, does not relieve it from liability for injuries sustained by a passenger on a car of the lessee caused by the negligence of the lessee's servants.[4]

[2] White v. Railroad Co., 115 N. C. 631, 20 S. E. 191. The lessors of a steamer are not liable for an injury to a passenger caused by the negligence of the lessees, who have the entire and exclusive possession, control, and management thereof. Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981.

[3] Ft. Worth St. Ry. Co. v. Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61; Singleton v. Railroad, 70 Ga. 464; Chollette v. Railroad Co., 26 Neb. 159, 41 N. W. 1106.

[4] Braslin v. Railroad Co., 145 Mass. 64, 13 N. E. 65. A horse railroad corporation, which by its charter was rendered liable for all in-

But, on the other hand, it has been explicitly held that statutory authority to lease its road will exempt the lessor from liability for injuries to passengers caused by the negligence of the lessee, without an express exemption from liability by statute.[5]

juries caused by the carelessness or misconduct of its servants or agents, was by a subsequent statute authorized to lease its road, but the statute expressly provided that the lease should not exempt or release the corporation from any duty or liability to which it would otherwise be subject. Held, that a passenger injured by the negligence of the lessee's servants might maintain an action therefor against the lessor. Quested v. Railroad Co., 127 Mass. 204.

[5] Arrowsmith v. Railroad Co., 57 Fed. 165; Mahoney v. Railroad Co., 63 Me. 68; Fisher v. Railroad Co., 34 Hun, 433. In Arrowsmith v. Railroad Co., the court said: "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relations with it (such as statutory requirements to fence the track, and liability for fires caused by engines running on the road), it may very well be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not absolve it from liability. So, if a railway be in such condition that it is a nuisance when leased out, by absence of something necessary to its safe operation, or the presence of something preventing its safe operation, and this nuisance be continued by the lessee, both the lessor and the lessee would be liable,—the one as having created, and the other as having continued, a nuisance. But to say that, after the lessor has by authority of law transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease, and the legislative sanction under which it was made. The state, on grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy to authorize the courts to say that the responsibility for the future management and operation of the road has not been exclusively imposed upon the lessee as the lawful substitute for the company owning the road. * * * With respect to the future management and operation of the road, the state had consented that, from and

Unquestionably, a lease authorized by statute, by which the lessee is to be exclusively liable for the negligence of employés operating the trains, does relieve the lessor from liability for injuries in this class of cases.[6]

§ 381. SALE OF RAILROAD.

The same principles apply to a sale of a railroad as to a lease. A sale of its franchises and property by a railroad company, without legislative sanction, is void, and the company continues to be liable for injuries to passengers resulting from the negligence of its vendee. In such a case, both companies are responsible.[1] So a contract by which a railroad company transfers its right of way over a river to a bridge company will not enable either it or the bridge company

after its lease, the lessee should stand as substitute for the owner in regard to all those rights and liabilities which should spring out of the future management and operation of the leased road. The duty to carry the plaintiff's intestate with the highest degree of care and skill did not rest upon any charter requirement, or spring from any general statutory law of the state. The duty was imposed by operation of common law upon the contract of carriage. The right to maintain this action arises from the contract relation of carrier and passenger. If intestate had been carried safely, there would be no right of action by reason alone of the defective condition of the road. The duty to keep the road in repair is like the duty to furnish a safe vehicle. Each arises from the relation of carrier and passenger. Each is imposed upon the lessee company by necessary legal effect of the assumption of the carrier's duty."

[6] Philips v. Railroad Co., 62 Hun, 233, 16 N. Y. Supp. 909; s. c. 139 N. Y. 650, 35 N. E. 207.

§ 381. [1] Ricketts v. Railway Co., 85 Ala. 600, 5 South. 353; East Line & R. R. Ry. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834.

to charge passengers more than the statutory fare for crossing the bridge.[2]

§ 382. CONSOLIDATION OF RAILROADS.

A consolidated railway company succeeds to all the rights, and impliedly assumes all the liabilities, of the original companies, including the liability for personal injuries to passengers sustained before the consolidation.[1] "This doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment." [2] But the consolidation of two railroad companies does not abate a suit against one of them pending at the time of the consolidation.[3]

§ 383. ULTRA VIRES DEFENSE.

The fact that a corporation has no authority in point of law to carry passengers in the mode adopted by it, or to the places to which it has undertaken so to do, is no ground for exempting it from liability to a passenger injured during the journey. "The doctrine of ultra vires does not apply to torts of this nature. It would, indeed, be an anomalous result in legal science

2 Southern Pac. R. Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

§ 382. 1 Cleveland, C., C. & St. L. R. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37.

2 Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465.

3 Evans v. Railway Co., 106 Mo. 594, 17 S. W. 489.

if a corporation should be permitted to set up that, inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrongs by way of defense. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are in a sense ultra vires; and, if the want of a franchise to do the tortious act be a defense, then corporations have a dispensation from liability for these acts peculiar to themselves." [1] Thus, a lessee of a railroad cannot relieve itself from liability for injuries to a passenger caused by its negligence by showing that the lease was unlawful.[2] So, a railroad company which has hired stagecoaches to transport passengers to and from one of its stations to a neighboring village cannot defend an action for personal injuries to a passenger on the stagecoach on the ground that its charter gave it no power to transport passengers to a point not on its line, or by stagecoach.[3] So, though the act of a railroad company in carrying passengers on a line of steamers owned by it may be ultra vires, and outside the scope

§ 383. [1] New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. Law, 137.

[2] Feital v. Railroad Co., 109 Mass. 398.

[3] Buffett v. Railroad Co., 40 N. Y. 168, affirming 36 Barb. (N. Y.) 420. A contract by a railroad company to transport a passenger and her baggage to a point beyond its line is not ultra vires and void. Cary v. Railroad Co., 29 Barb. (N. Y.) 35.

of its corporate powers, it is liable for injuries to passengers so carried, caused by its negligence or that of its servants.[4]

[4] Gruber v. Railroad Co., 92 N. C. 1. But in Georgia it has been held that a railroad company has no power, under the laws of that state, to enter into a partnership with a natural person to run a line of boats and carry passengers, and that a passenger on the boat cannot recover against the railroad company for injuries sustained, since he must take notice of the extent of its powers, and that the contract of partnership was beyond the scope of its authority. Gunn v. Railroad, 74 Ga. 509.

CHAPTER XXVII.

RECEIVERS AND MORTGAGE TRUSTEES AS CARRIERS.

§ 384. Receivers as Common Carriers.
385. Same—Actions against.
386. Same—Liability of Railroad Company.
387. Same—Effect of Discharge.
388. Mortgage Trustees.

§ 384. RECEIVERS AS COMMON CARRIERS.

As to passengers transported on railroads operated by receivers, the receivers will be treated, in their representative character, as common carriers.

Receivers who have exclusive charge and control of the property belonging to a railroad company, and of the management of its business, are bound to the same degree of care as the corporation itself would have been under the management of its board of directors, and are in like manner liable, in their official character, for injuries resulting from the negligence of themselves, their agents or employés.[1] But a judgment against the receiver of a railroad for injuries to a passenger must be entered against him as receiver,

§ 384. [1] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587; Little v. Dusenberry, 46 N. J. Law, 614. Where it appears that defendant was the receiver of a railroad when a passenger was injured, the presumption is that he was performing his duty imposed on him by that relation, and that he was operating the road, in the absence of any plea or denial. McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Id., 31 Ill. App. 100.

and be made payable out of the funds held by him in that capacity, in the due course of the administration of his receivership; and it is error to render judgment against him individually,[2] except, perhaps, in cases where he has personally been guilty of negligence.[3] But receivers of a railroad are not liable for their failure to fulfill a contract for transportation made by the company before their appointment.[4]

§ 385. SAME—ACTIONS AGAINST.

In the absence of statute, there is no better settled proposition than that a receiver, as such, cannot be sued elsewhere than in the court by which he is appointed, without leave of such court had and obtained; and whether leave to sue will be granted rests in the discretion of the court.[1] But, so far as receivers appointed by the federal courts are concerned, this rule has been changed by a statute which declares that "every

[2] McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631, reversing 31 Ill. App. 100. See, also, Sloan v. Railway Co., 62 Iowa, 728, 16 N. W. 331; Thurman v. Railroad Co., 56 Ga. 376; Cardot v. Barney, 63 N. Y. 281; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 12.

[3] Hopkins v. Connel, 2 Tenn. Ch. 323.

[4] Casey v. Railroad Co. (Wash.) 48 Pac. 53.

§ 385. [1] Reed v. Axtell, 84 Va. 234, 4 S. E. 587; Melendy v. Barbour, 78 Va. 544; Peale v. Phipps, 14 How. 368; Barton v. Barbour, 104 U. S. 126, affirming 3 MacArthur, 212. But receivers running a railroad under appointment of a court of chancery of another state, who act as common carriers, and are there held liable to actions at law for breach of duty as such, may be sued as common carriers in this commonwealth. Under these circumstances, the ordinary rule, that receivers are amenable solely to the court by which they are appointed, is inapplicable. Paige v. Smith, 99 Mass. 395.

receiver * * * may be sued in respect of any act or transaction of his, in carrying on the business connected with such property, without the previous leave of the court in which said receiver or manager was appointed." [2] The language of this statute is broad enough to include actions growing out of the negligence or other torts of the receiver or his agents or servants.[3] The effect of this statute has been thus stated by the supreme court of Texas: "No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and is not open to revision by it if the court rendering the judgment had jurisdiction of the subject-matter and of the parties. The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim." [4]

[2] Act Cong. March 3, 1887.

[3] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587; Railroad v. Cox, 145 U. S. 601, 12 Sup. Ct. 905; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, affirming 137 Ill. 270, 27 N. E. 452; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; Ball v. Mabry, 91 Ga. 781, 18 S. E. 64.

[4] Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139. As the receiver of a railroad, operating it under legal authority, exercises the charter franchises of the railroad company, he is subject to suit in any county in which the railroad corporation itself may be sued for a like cause

§ 386. SAME—LIABILITY OF RAILROAD COMPANY.

A railroad corporation cannot be held liable for injuries to passengers or others sustained while its road was being operated by a receiver. The surrender of the property to the receiver is not a voluntary act on the part of the company, his possession is not its possession, and it can control neither him nor his employés.[1]

To this general rule there are, however, some exceptions. The control of the receiver must in fact be exclusive of that of the railroad company.[2] The appointment of a receiver for a railroad does not discharge the company from liability for accidents thereafter happening on the road, where it appears that the re-

of action, and the suit need not be brought in the county where the receiver resides. While his personal residence is unaffected, his official residence coincides with that of the company he represents, the action being brought to enforce official, and not personal, liability. Ball v. Mabry, 91 Ga. 781, 18 S. E. 64.

§ 386. [1] Memphis & L. R. Ry. Co. v. Stringfellow, 44 Ark. 322; Metz v. Railroad Co., 58 N. Y. 61; Godfrey v. Railway Co., 116 Ind. 30, 18 N. E. 61; Dillingham v. Anello (Tex. Civ. App.) 29 S. W. 1103; Texas & P. Ry. Co. v. Huffman, 83 Tex. 286, 18 S. W. 741; Howard v. Railroad Co., 6 Pa. Co. Ct. R. 589. But the mere fact that the property of a railroad company has passed into the hands of a receiver does not bar a suit theretofore instituted against the corporation to recover a demand against it. Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80. Nor does the appointment of a receiver deprive the court of jurisdiction of an action against the railroad company for injuries sustained before such appointment. The fact that leave to sue was not obtained from the court appointing the receiver is no ground for abating the action. Ohio & M. Ry. Co. v. Nickless, 71 Ind. 271.

[2] Washington, A. & G. R. Co. v. Brown, 17 Wall. 445.

ceiver's possession was not exclusive, but that the road was in fact managed and controlled by the agents and employés of the company, and that the only substantial duty that the receiver discharged was to receive the net earnings of the road from the treasurer, and to account therefor to the court by which he was appointed.[3]

Another exception is this: If current earnings be invested by the receiver in betterments upon the road, and the road and other property are returned to the company, without sale, at the close of the receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings, and the company is liable for the torts of the receiver to the extent of such betterments. The reason is that the earnings of the receiver are chargeable for his torts, as part of the operating expenses; and if such earnings be invested in betterments, which, without sale, are returned to the company, with its other property, at the close of the receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings.[4] It

[3] Pennsylvania R. Co. v. Jones, 155 U. S. 333, 349, 15 Sup. Ct. 136.

[4] Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463; Texas & P. Ry. Co. v. Bloom, 85 Tex. 279, 20 S. W. 133; Texas & P. Ry. Co. v. Comstock, 83 Tex. 537, 18 S. W. 946; Texas & P. R. Co. v. Miller, 79 Tex. 78, 15 S. W. 264; Ryan v. Hays, 62 Tex. 42; International & G. N. Ry. Co. v. Ormond, Id. 274; Texas & P. Ry. Co. v. Edmond (Tex. Civ. App.) 29 S. W. 518; Mobile & O. R. Co. v. Davis, 62 Miss. 271. This rule has been recently approved by the supreme court of the United States. Texas & P. Ry. Co. v.

has been further held by the Texas courts that a provision in the decree of a federal court, discharging the receiver, which attempts to relieve the company from liability on all claims accrued during the receivership which have not been established by intervention in the receivership suit, is nugatory, in so far as it affects a citizen of Texas who has not appeared in the receivership suit, and such citizen may sue the railroad company in the state courts of Texas to satisfy his claim.[5]

The Texas legislature has gone still further, and has enacted that in such a case, where the property has been returned to the company without sale, it is responsible for a debt or liability incurred during the receivership, without reference to the question of betterments.[6] This statute has been pronounced "not only constitutional, but pre-eminently just and equitable." [7]

§ 387. SAME—EFFECT OF DISCHARGE.

After their discharge, receivers of a railroad company are not liable on claims for personal injuries accruing during their receivership.[1] All suits pending

Manton, 164 U. S. 636, 17 Sup. Ct. 216, affirming 9 C. C. A. 309, 60 Fed. 979.

[5] Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, affirmed in 151 U. S. 81, 14 Sup. Ct. 250, in so far as federal questions are concerned; Texas & P. Ry. Co. v. Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086.

[6] Act Tex. March 19, 1889.

[7] Missouri, K. & T. R. Co. v. Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

§ 387. [1] Missouri, K. & T. Ry. Co. v. Wylie (Tex. Civ. App.) 33 S. W. 771.

against them in other courts are abated by their discharge. A state statute which provides that the discharge of a receiver shall not have this effect on pending suits does not apply to receivers appointed by the federal courts, but only to those appointed by state courts.[2]

§ 388. MORTGAGE TRUSTEES.

A distinction seems to exist between the liability of mortgage trustees taking possession and operating a railroad under a provision in the mortgage and receivers appointed by the court. Such a trustee operating a railroad is personally liable for the negligence of his employés, while, as we have seen, receivers are not so liable. The reason for the distinction lies in the fact that a mortgage trustee takes possession voluntarily, while a receiver appointed by the court is directed by it to take possession, and is, in a certain sense, a public officer. No reason exists why mortgage trustees are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees, or any others exercising the franchises of the company for the time, must be; that is, that they are the ostensible parties who appear to the public to be exercising the franchises of the company. It would be perplexing in the extreme to require strangers, suffering injury through the negligence of the operatives under the trustee's control, to look beyond the party exercising such control. The party having this independent control is, in general, liable for the

[2] Fordyce v. Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

acts of those under his control, whether of contract or tort.[1] The railroad company is not liable for personal injuries or loss of life occurring on its road while it was being operated and in the possession and control of mortgagees.[2]

§ 388. [1] Sprague v. Smith, 29 Vt. 421, 425. See, also, Gluck & B. Rec. p. 392, § 78.

[2] State v. Consolidated European & N. A. Ry. Co., 67 Me. 479. But in Pennsylvania R. Co. v. Jones, 155 U. S. 333, 353, 15 Sup. Ct. 136, it was held that the fact that trustees are operating the road under a clause in a mortgage will not relieve the company from liability for accidents while the road is in the trustee's hands, unless it appears that the business of management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers and board of directors, and that this was so notoriously so that the fact may well be presumed to be known by the public

CHAPTER XXVIII.

LIMITATION AND DISCHARGE OF LIABILITY.

§ 389. Power to Stipulate against Negligence.
390. Same—Statutory Prohibitions.
391. Same—Rule in New York and in England.
392. Same—Gross Negligence Rule.
393. Same—Gratuitous Passengers.
394. Same—Who are Gratuitous Passengers.
395. Same—Express Messengers.
396. Same—Connecting Lines.
397. Same—Limitation as to Amount of Recovery.
398. Conflict of Laws.
399. Mode in Which Limitation may be Made.
400. Same—Contract with Third Person.
401. Construction of Contract.
402. Release and Discharge after Injury.
403. Same—Rescission.
404. Same—Ratification and Laches.

§ 389. POWER TO STIPULATE AGAINST NEGLIGENCE.

The American rule is that common carriers cannot, even by express contract, limit their liability for their own or their servants' negligence in respect to passengers for hire. But in England and in the state of New York it is held that common carriers may thus limit their liability for their servants' negligence.

The leading American case on this subject is New York Cent. R. Co. v. Lockwood,[1] decided by the supreme court of the United States in 1873. In this case the

§ 389. [1] 17 Wall. 357.

court laid down the following propositions of law: (1) A common carrier cannot lawfully stipulate for exemptions from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. In support of these propositions it was said: "It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability that men may be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. * * * Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out, and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he must

do this, or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it would with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangement which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions on travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of persons with whom they contract, must rest upon their fairness and reasonableness."

This rule has been adopted in the great majority of the American states, as part of the common law.[2]

[2] Grand Trunk Ry. v. Stevens, 95 U. S. 655; Louisville, N. A. & C. Ry. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Ohio & M. Ry. Co. v.

And, in the absence of legislation by the federal government as to the validity of stipulations by a common carrier for exemption from liability for injuries to passengers, in contracts for interstate carriage, their validity is to be determined by the common law.[3]

§ 390. SAME—STATUTORY PROHIBITIONS.

In some states, statutes prohibit carriers from limiting their common-law liability by contract.[1] The supreme court of Iowa has recently held that such a statute is not a regulation of interstate commerce, as applied to a contract exempting the carrier from liability

Selby, 47 Ind. 471; Com. v. Vermont & M. R. Co., 108 Mass. 7. A railroad company cannot, by contract with a passenger whose ticket is not a gratuity, exempt itself from liability for its negligence or that of its servants. Doyle v. Railroad Co., 166 Mass. 492, 44 N. E. 611. "It is settled law in this state that a carrier cannot, by contract, stipulate against its own negligence. This rule, in its application to passengers, has never been relaxed." Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883; Tibby v. Railway Co., 82 Mo. 292. "In Pennsylvania we have always adhered to one rule with regard to the limitation of their liability by common carriers, from Beckman v. Shouse, 5 Rawle (Pa.) 179, decided on the 30th March, 1835, to Goldey v. Railroad Co., 30 Pa. St. 242, decided in 1858, a period of twenty-three years, and such is still the doctrine of our courts." Pennsylvania R. Co. v. Henderson (1865) 51 Pa. St. 315. To same effect: Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382; Pennsylvania R. Co. v. Miller, 87 Pa. St. 395; Pennsylvania R. Co. v. Raredan, 119 Pa. St. 577; Pennsylvania R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526.

[3] Davis v. Railway Co., 93 Wis. 470, 67 N. W. 16.

§ 390. [1] McClain's Code Iowa 1888, §§ 2007, 3371; Const. Ky. § 196; Ky. St. 1894, p. 138. "No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect shall be valid." Code Va. 1887, § 1296.

for injuries to a passenger whom it has undertaken to carry from a point within the state to a point without.[2]

The general railway act of Canada prohibits railway companies from protecting themselves against liability "by notice, condition, or declaration." [3] The supreme court of Canada has recently held that this statute prohibits railway companies from entering into any contract to protect themselves from liability, and is not aimed merely at public or general notices limiting liability.[4]

§ 391. SAME—RULE IN NEW YORK AND IN ENGLAND.

"The rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents; but that, to accomplish this object, the contract must be so expressed, and it must not be left to a presumption from the language." [1] A similar rule prevails in England,[2] Ireland,[3] and New South Wales.[4]

[2] Solan v. Railway Co. (Iowa) 63 N. W. 692.

[3] 31 Vict. c. 68, re-enacted by Consol. Ry. Act 1879, 42 Vict. c. 9, § 25, subsecs. 2–4.

[4] Grand Trunk Ry. Co. v. Vogel, 11 Sup. Ct. Can. 612, affirming 10 Ont. App. 162, 2 Ont. 197.

§ 391. [1] Kenney v. Railroad Co., 125 N. Y. 422, 26 N. E. 626, affirming 54 Hun, 143, 7 N. Y. Supp. 255. See, also, Perkins v. Rail-

[2] McCawley v. Railway Co., L. R. 8 Q. B. 57.

[3] Duff v. Railway Co., L. R. 4 Ir. C. L. 178.

[4] A contract which exempts a carrier from liability for any loss, damage, or injury to the person of the passenger, is valid, and relieves the carrier from liability for injuries caused by his negligence. Kelly v. Navigation Co., 6 N. S. Wales, 233.

The reasons for this rule are thus stated by Mr. Everett P. Wheeler: [5] "In the absence of positive prohibition, or well-settled public policy, having the force of positive prohibition, the agreement of the parties is the law of the case. In the next place, it is to be observed that it is always dangerous for a court to undertake to determine public policy. That would seem to be properly the province of the legislature. It is true that some rules are so firmly established by common consent that there needs no legislative declaration to establish them; yet it must also be admitted that these rules are few. It is also true that what may be at one time a wise public policy, under different circumstances and at different times may cease to be wise; yet no one knows better than a lawyer how difficult it is to induce a court which has once laid down a rule on the subject to recede from it. What was originally public policy becomes adjudication, and has the force of an adjudication, and sometimes, under different circumstances, becomes a public detriment, instead of a public benefit. * * * Whatever reasons may originally have existed for the requirement that a carrier should answer for all loss arising from the negligence of its agents, there would seem to be no good reason

road Co., 24 N. Y. 196, 206; Blair v. Railroad Co., 66 N. Y. 313, 318; Mynard v. Railroad Co., 71 N. Y. 180; Holsapple v. Railroad Co., 86 N. Y. 275; Nicholas v. Railroad Co., 89 N. Y. 370; Canfield v. Railroad Co., 93 N. Y. 532; Smith v. Railroad Co., 24 N. Y. 222, affirming 29 Barb. 132; Bissell v. Railroad Co., 25 N. Y. 442, reversing 29 Barb. 602; Poswell v. Railroad Co., 5 Bosw. 699.

[5] Wheeler, Carr. 95–97.

why a carrier, who takes all reasonable precautions to secure competent and faithful agents, should be liable for a fault on their part, of which he has no knowledge, and which he could not in any way prevent. The business of carriers has assumed such vast proportions that it is impossible for them to exercise personal supervision over all their employés. And it would seem unjust to impose upon them an absolute responsibility, for which no contract is allowed to provide, and against which no amount of care can furnish an entire safeguard. The question is really one of the amount of consideration that the shipper or passenger is willing to pay. He is not bound to accept the qualified engagement from the carrier, but may insist that his goods shall be carried under the common-law liability of such carrier. On the other hand, it would seem unjust to say that if he were willing for a less remuneration to contract for the carriage of his goods, and thus act as his own insurer, or procure insurance elsewhere, he should not be allowed to do so."

It should be borne in mind, however, that, to uphold such a stipulation, there must be some consideration. A passenger paying full fare has a right to all the safeguards thrown about him by law for his protection, and a contract by him to waive them, or any part of them, would be without consideration, and void. Thus, a condition in a free ticket issued to a mail agent, relieving the company from liability for the negligence of its servants, is void, as without consideration; since, by its contract with the government, the railroad com-

pany receives compensation for transporting both the mail and its custodian.[6]

§ 392. SAME—GROSS NEGLIGENCE RULE.

In Illinois it is held that a common carrier may, by contract with a passenger, exempt itself from liability on account of the negligence of its servants, other than that which is gross or willful.[1] Gross negligence, in this respect, does not mean willful or intentional negligence, but the want of slight diligence or care.[2] No distinction seems to be made between paying passengers and gratuitous passengers in this respect; the carrier being liable for the gross negligence of its servants, though the passenger is riding free, under an agreement to assume all risks of accident.[3]

The rule adopted in Louisiana seems to be in substantial accord with the Illinois rule. It has been held that a stipulation in a free ticket given to a person selling papers, books, etc., on the train, exempting the company from liability for injuries caused by its negligence, is valid; but that a common carrier can-

[6] Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Seybolt v. Railroad Co., 95 N. Y. 562, 573, affirming 31 Hun, 100.

§ 392. [1] Arnold v. Railroad Co., 83 Ill. 273; Chicago, B. & N. R. Co. v. Hawk, 42 Ill. App. 322. The carriage of a passenger on a freight train is a sufficient consideration to uphold a contract limiting the company's liability for injuries, except such as are the result of gross negligence. Arnold v. Railroad Co., 83 Ill. 273.

[2] Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; Jacksonville S. E. R. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093; Id., 32 Ill. App. 307; Illinois Cent. R. Co. v. O'Keefe, 63 Ill. App. 102.

[3] Illinois Cent. R. Co. v. Read, 37 Ill. 485; Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80.

not stipulate to exempt itself for injuries caused by the fraudulent, willful, or reckless misconduct of its agents or employés.[4] This, too, seems to be the rule under the California Code.[5]

It is not at all likely that the gross negligence doctrine of the Illinois courts will be adopted by any courts in which it does not now prevail. The decided tendency of modern decisions is to disregard all distinctions between degrees of negligence. Indeed, in Indiana the rule was at one time the same as in Illinois; but the cases on this point were overruled, and the rule was adopted that a common carrier cannot by contract exempt itself from liability for loss resulting from any negligence on its part.[6]

§ 393. SAME—GRATUITOUS PASSENGERS.

By the weight of authority and of reason, a condition in a pass issued to a passenger as a pure gratuity, exempting the carrier from liability for negligence, is valid.[1] "When the intending passenger proposes to

[4] Higgins v. Railroad Co., 28 La. Ann. 133.

[5] "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." Civ. Code Cal. § 2175; Comp. Laws Dak. 1887, § 3887; Civ. Code Mont. 1895, § 2877.

[6] Ohio & M. Ry. Co. v. Selby, 47 Ind. 471, overruling Wright v. Gaff, 6 Ind. 416; Indianapolis & C. R. Co. v. Remmy, 13 Ind. 518; Indiana Cent. Ry. Co. v. Mundy, 21 Ind. 48; and Thayer v. Railroad Co., 22 Ind. 26,—in so far as these cases hold that a carrier may exempt itself from ordinary negligence, but not for gross negligence.

§ 393. [1] Griswold v. Railroad Co., 53 Conn. 371, 4 Atl. 261; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069; Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. 205; Kinney v. Railroad Co., 34 N. J. Law,

the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz. to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree to or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon conditions like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the lives and limbs of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled; and, of all passengers carried, but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers of land and water transportation companies are not gauged by the fact that there may be free passengers on board, and never will be while the doctrine of respondeat superior has its present healthy condition. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of hu-

513, affirming 32 N. J. Law, 407; Wells v. Railroad Co., 24 N. Y. 181, affirming 26 Barb. 641; Muldoon v. Railway Co., 7 Wash. 528, 35 Pac. 422; Id., 10 Wash. 311, 38 Pac. 995; Sutherland v. Railway Co., 7 U. C. C. P. 409.

manity, have incalculably more influence upon the servants of these carriers in making them careful than any thought of damage suits in favor of free passengers." [2]

In Wisconsin it is held that, where a passenger is carried gratuitously, the railroad company may, by contract, relieve itself from all liability to him for injuries caused by the negligence of its employés, except where such negligence is gross or criminal.[3]

In some of the states, however, it is held that a common carrier of passengers cannot by contract, even with a passenger whom it carries gratuitously,[4] exonerate itself from liability for negligence. These decisions are based on the principle that the state, as parens patriæ, has an interest in protecting the lives and limbs of its subjects, and that this consideration of public policy cannot be overriden by any stipulation of the parties.[5] The most recent case declaring this rule was decided by the supreme court of Texas in 1886,[6] and it says in justification thereof: "The rule is wholesome, is demanded by the nature of the employment, and embraces a policy which no state having a due regard for the safety and lives of its people can abandon; for it discourages negligence by holding

[2] Muldoon v. Railway Co., 7 Wash. 528, 35 Pac. 422.

[3] Annas v. Railroad Co., 67 Wis. 46, 30 N. W. 282.

[4] Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110); Bryan v. Railway Co., 32 Mo. App. 228; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Buffalo, P. & W. R. Co. v. O'Hara, 3 Penny. (Pa.) 190; Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640.

[5] Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110).

[6] Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640.

the carrier to strict accountability, and imposes upon him no responsibility which he does not voluntarily assume when he engages in such employment."

In Iowa, it is held that under a statute which provides that railroad companies shall be liable for all damages sustained by the negligence of their employés, "all contracts to the contrary notwithstanding," a railroad company cannot by contract relieve itself from liability for injuries caused by its negligence to even a purely gratuitous passenger.[7]

§ 394. SAME—WHO ARE GRATUITOUS PASSENGERS.

To constitute one a gratuitous passenger, within the meaning of the rule permitting the carrier to exempt itself from liability, the transportation must be absolutely without consideration of any kind. The mere fact that a passenger is traveling on a pass does not fix his status as a free passenger, nor estop him from showing that he is in fact a passenger for hire.[1] Thus, it is uniformly held, by courts which deny to the carrier the power to limit his liability to passengers for hire, that a shipper accompanying his live stock, and riding on a drover's pass issued to him in consideration of the freight paid for his stock, and in consideration of his taking care of it during the journey, is not a gratuitous, but a paying, passenger; and a condition in the pass relieving the carrier from liability for injuries caused by its negligence, or that of its servants,

7 Rose v. Railroad Co., 39 Iowa, 246.

§ 394. 1 Grand Trunk Ry. v. Stevens, 95 U. S. 655.

is void as against public policy.[2] So, a passenger accompanying a shipment of live poultry, taking care of it, and transported in consideration of the freight charge, is a passenger for hire.[3] So, a ticket issued to an employé of a railroad company, to enable him to travel from the place where he lives to the place where he works, must be regarded as issued for the mutual advantage of both parties, and hence it is not a mere gratuity, within the rule permitting railroad companies to limit their liability as to gratuitous passengers.[4]

[2] Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1; Carroll v. Railway Co., 88 Mo. 239; Flinn v. Railroad Co., 1 Houst. (Del.) 469, 501; Ohio & M. Ry. Co. v. Selby, 47 Ind. 471; New York Cent. R. Co. v. Lockwood, 17 Wall. 357; Louisville & N. R. Co. v. Bell (Ky.) 38 S. W. 3; Saunders v. Southern Pac. Co. (Utah) 44 Pac. 932; Davis v. Railway Co. (Wis.) 67 N. W. 16. A railroad company cannot, by conditions in the contract of carriage of a drover accompanying stock, limit its liability for injuries to him, caused by the negligence of its servants; and an attempt to limit the authority of an agent of such a company to make contracts of carriage, within the ordinary scope of his authority, by requiring such a condition to be inserted in the contract of carriage, is nugatory. Baltimore & O. R. Co. v. McLaughlin, 19 C. C. A. 551, 73 Fed. 519. In New York and in England, conditions in drovers' passes exempting the carrier from liability have been sustained; but the theory is that the carrier may exempt itself from liability as to others than purely gratuitous passengers. See ante, § 391.

[3] Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209.

[4] Doyle v. Railroad Co. (Mass.) 44 N. E. 611. A contract between a railroad company and a news agent, exempting the company from liability for injuries caused by its negligence, is void as against public policy, as respects negligence consisting of a violation of a statute requiring trains to stop before crossing an intersecting railroad, and providing that every corporation violating the statute shall be liable in the full amount of damages resulting to any person from such violation. Starr v. Railway Co. (Minn.) 69 N. W. 632.

On the other hand, the purchase of a drawing-room car ticket, giving a passenger a right to ride in the drawing room car, does not make him a passenger for hire, so as to annul a condition in a pass, issued to him as a pure gratuity, exempting the railroad company from liability for injuries caused by the negligence of its servants.[5]

§ 395. SAME—EXPRESS MESSENGERS.

Some conflict of authority has recently arisen as to the power of a railroad company to limit its liability for injuries to express messengers. The supreme court of Indiana has held that it is not the duty of a railroad company, as a common carrier, to carry the goods of an express company, or the messenger in charge of them; and hence a railroad company may by contract protect itself from the results of its own negligence, and that of its servants, as to express messengers on its trains.[1] On the other hand, the federal circuit court of Ohio has held that an express messenger carried in the express car under a contract between the express company and the railroad company is a passenger for hire, and the railroad company cannot contract with him for exemption from liability for injuries to him caused by its negligence, or that of its servants. "When a railroad company carries an express messenger, it is discharging its

[5] Ulrich v. Railroad Co., 108 N. Y. 81, 15 N. E. 60, reversing 13 Daly (N. Y.) 129.

§ 395. [1] Louisville, N. A. & C. Ry. Co. v. Keefer (Ind. Sup.) 44 N. E. 796; Pittsburgh, C., C. & St. L. Ry. Co. v. Mahony (Ind. Sup.) 46 N. E. 917.

functions as a common carrier of passengers. * * * If the company, in order to discharge its duty to the public to afford express facilities upon its line, agrees to carry him in a special car in a passenger train, he does not thereby lose his rights and character as a passenger." [2]

The supreme judicial court of Massachusetts has held that an agreement by an express messenger, desirous to ride, for the conduct of his business, in a baggage car, in violation of the company's rules, by which he assumed all risk of injury therefrom, is not invalid, as against public policy; and he cannot recover for injuries caused by the negligence of the company's servant, to which his presence in the baggage car directly contributed. "The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his right as a passenger, and he was under no compulsion to enter into it." [3] Still more recently the same court has held that where an express messenger desiring to ride, for the conduct of his business, in the baggage car of a railroad company, in contravention of its rules, agrees to assume all risk of accident and injury while so riding, the railroad company is relieved from all liability for his injuries while riding in the baggage

[2] Voight v. Railway Co., 79 Fed. 561, disapproving the Indiana cases. It would seem that the conclusion of the federal court is strictly in line with the decisions denying the carrier's power to limit its common-law liability as to drovers accompanying stock.

[3] Bates v. Railroad Co., 147 Mass. 255, 17 N. E. 633.

car, however arising, including injuries to which riding in the baggage car did not contribute.[4]

§ 396. SAME—CONNECTING LINES.

It is held without dissent that a railroad company selling a ticket to a point beyond its own line may limit its liability by a stipulation that it will not be responsible beyond its own line.[1] It is only because the carrier has voluntarily contracted to do so that it can be required to transport a passenger over any other lines than its own; and it results that, like other contracting parties, it may define the terms and limit the extent of its undertaking over other lines, insomuch as may be required to leave on them the responsibilities of their own negligence.[2]

[4] Hosmer v. Railroad Co., 156 Mass. 506, 31 N. E. 652.

§ 396. [1] Kerrigan v. Railroad Co., 81 Cal. 248, 22 Pac. 677; Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142; Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 208; Harris v. Howe, 74 Tex. 534, 12 S. W. 224; Texas & P. Ry. Co. v. Hawkins (Tex. Civ. App.) 30 S. W. 1113.

[2] Harris v. Howe, 74 Tex. 534, 12 S. W. 224. In International & G. N. Ry. Co. v. Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845, it was, however, held that, while a carrier may stipulate for nonliability for the wrongful act or omission of a connecting road, it is bound to furnish a passenger transportation to the place indicated on his ticket; and it is therefore liable for his wrongful ejection from the train by a connecting carrier, in such sum as will compensate him for money necessarily paid out for railroad fare and hotel bills, and for loss of time, necessarily arising out of the breach of contract. The first carrier, however, is not liable for mental suffering caused by the rude and insulting manner of the conductor of the connecting line, who put the passenger off, since this is a tort, and not a breach of contract, against which the first carrier is protected by the terms of its contract.

In England it has been held that a stipulation in a free ticket that the passenger shall travel at his own risk means that he shall be at his own risk during the whole of the journey covered by the ticket, and it will protect a connecting carrier on whose road the passenger was injured through the negligence of its servants.[3]

§ 397. SAME—LIMITATION AS TO AMOUNT OF RECOVERY.

Carriers have often attempted to limit their liability for loss of or injury to goods and baggage during transportation; but only one such attempt seems ever to have been passed on by the courts in cases of carriers of passengers. In that case the court held that a stipulation in a railroad ticket that the amount of fare demanded by the conductor of the holder shall be the measure of recovery for the violation of the contract of carriage by the company is not reasonable, and does not prevent the holder from recovering damages for the tort committed in ejecting him.[1]

§ 398. CONFLICT OF LAWS.

The validity of a contract exempting a carrier from liability for injuries or loss to a passenger must be determined by the law of the state or country where made; and, if valid there, it will be upheld by the

[3] Hall v. Railway Co., L. R. 10 Q. B. 437.

§ 397. [1] Galveston, H. & S. A. Ry. Co. v. Kinnebrew, 7 Tex. Civ. App. 549, 27 S. W. 631.

courts of a state in which a similar contract, if made there, would be held void as against public policy. The reason is that such a contract is neither immoral, nor does it contravene any express provision of law; and hence, if valid in the country where made, it will be upheld in other jurisdictions on the principle of comity.[1] But in Nebraska it has recently been held that a limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, since such attempted restriction of liability is illegal, and contrary to the public policy of this state.[2]

§ 398. [1] Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665; O'Regan v. Steamship Co., 160 Mass. 356, 35 N. E. 1070. The rights and obligations of a passenger who enters into a contract in another state for transportation wholly within that state must be determined solely by the laws of the state where the contract is made and performed; and a stipulation that the passenger assumes all risk of accident, if valid by the laws of that state, is valid and binding in this state, though the law is different here. Knowlton v. Railway Co., 19 Ohio St. 260. A daughter, residing in Massachusetts, paid to the agent of a steamship company in Boston the full price of a steerage passage for her mother, residing in Ireland. The agent issued to the daughter a receipt for the money entitling the mother to a steerage passage, and a memorandum of a steerage passage for the mother. The daughter sent these papers to her mother in Ireland, and the mother presented them to the steamship agent in Ireland, who issued to her a regular steerage ticket, which contained a condition exempting the company from liability for injuries caused by its servants. Held, that the contract by which the rights of the parties were to be determined was made in Ireland, and was governed by the English law, by which the condition in question was valid. O'Regan v. Steamship Co., 160 Mass. 356, 35 N. E. 1070.

[2] Chicago, B. & Q. R. Co. v. Gardiner (Neb.) 70 N. W. 508.

§ 399. MODE IN WHICH LIMITATION MAY BE MADE.

The carrier can limit his common-law liability only by contract. Before a passenger is bound by a condition on a ticket limiting the carrier's liability, it must appear that he knew of the condition, or that the carrier did what was reasonably sufficient to give notice of the condition.

It has often been decided that one who accepts a written contract, and proceeds to avail himself of its conditions, is bound by the stipulations and agreements therein expressed, whether he reads them or not. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. But a ticket which appears to be a mere check, showing the points between which a passenger is entitled to be carried, and which contains conditions on its back which he does not read, does not fall within this rule. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations.[1] As was said in the house of lords,[2] in a case in which the carrier sought to limit his liability by an indorsement on a pasteboard ticket, merely indicating on its face the points between which it was good: "It would be extremely dangerous

§ 399. [1] Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665.
[2] Henderson v. Stevenson, L. R. 2 H. L. Sc. 470.

to hold that where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he shall be held to have assented to that which he has not seen, and of which he knows nothing." "Where a carrier desires to impose special and stringent terms upon its passengers, there is nothing unreasonable in requiring that these terms shall be distinctly declared and deliberately accepted." It has accordingly been held, in a very recent case, also decided in the house of lords, that the mere fact that a passenger, on payment of passage money, received a ticket folded up, on which no writing was visible unless opened and read, is not sufficient to charge him with notice of the condition.[3] But, where the form of the ticket indicates unmistakably that it undertakes expressly to prescribe the particulars which shall govern the conduct of the parties until the passenger reaches destination, a differ-

[3] Richardson v. Rowntree (1894) 6 Reports, 95. See, also, Parker v. Railway, 2 C. P. Div. 416. The method in which carriers may limit their liability is regulated by statute in some of the states. Rev. St. Ind. 1894, § 3298 (Rev. St. Ind. 1881, § 2904), requires any condition in a ticket or pass limiting the carrier's liability to be printed in nonpareil type, or larger type. Code Ga. 1882, § 2068, provides: "A common carrier cannot limit his liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." Comp. Laws Neb. 1893, p. 628, c. 72, art. 1, § 5, provides: "No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party, and assented to by him or them, in express terms, before such limitation shall take effect." 1 How. Ann. St. Mich. § 3418, requires a written contract, none of which shall be printed.

ent rule prevails. Thus, where a ticket for an ocean passage consists of two large quarto pages, covered with print and writing, and is headed, "Passengers' Contract Ticket," the passenger, in accepting and using the ticket, even if he does not read it, will be conclusively held to have assented to its terms, including a condition relieving the carrier from liability for loss or injury caused by its servant's negligence.[4] So, where a free ticket has printed on its face, "Read the other side," the passenger must be deemed to have notice of conditions on the back thereof limiting the carrier's liability; and it is immaterial whether he read them or not.[5] So, of course, where a passenger has his attention called to a condition on the back of his pass exempting the company from liability for injuries caused by negligence, and then rides on the pass with knowledge of the condition, a contract will be inferred.[6]

In recent cases, courts have been disposed to adopt

[4] Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665. Plaintiff purchased a paper book of coupons forming a railway ticket from "London to Paris and back, second class." Inside the cover—that is to say, the second page—there was a condition limiting the liability of each company to its own line and trains, and exempting it from liability for the negligence of the connecting carriers. Held, that the fact that plaintiff had failed to read this condition, and did not know of its existence, is no ground for rejecting the condition, since the whole book was the contract accepted by plaintiff. Burke v. Railway Co., 5 C. P. Div. 1. A passenger who takes a ticket, containing a condition on the back exempting the company from liability for injuries arising by reason of the passenger coach being attached to a goods train, is bound by the condition, though in fact unaware of its existence. Johnson v. Railway Co., 9 Ir. R. C. L. 108.

[5] Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. 205.

[6] Perkins v. Railroad Co., 24 N. Y. 196.

more stringent rules as against passengers riding on free passes. One who receives and uses a free pass entitling him to free transportation over a railroad is bound to see and know all of the conditions expressed therein which the carrier sees fit to lawfully impose, and is bound thereby, whether he actually read them or not.[7] Hence, where a pass is written to a specified person "and three ladies," one of the ladies who accepts the benefit of the pass, and travels on it as one of the ladies referred to, is bound by its terms, though she has never read it or been informed of its contents.[8]

§ 400. SAME—CONTRACT WITH THIRD PERSON.

A contract entered into between a carrier and a third person relieving the carrier from liability is not binding on a passenger who is given transportation under the contract, unless he knew of the condition, and assented to it. Thus, a contract between a stock owner and a railroad company releasing the company from liability for injuries to the person in charge of the stock is not binding on an employé of the stock owner, who was not a party to the contract, though he was designated by name as the person to accompany the stock.[1] So, a

[7] Muldoon v. Railway Co., 10 Wash. 311, 38 Pac. 995. An indorsement on a free ticket that the holder assumes all risks of accident becomes binding on him by accepting and using the ticket. Illinois Cent. R. Co. v. Read, 37 Ill. 485.

[8] Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069.

§ 400. [1] Porter v. Railroad Co., 59 Hun, 177, 13 N. Y. Supp. 491, affirmed 129 N. Y. 624, 29 N. E. 1029. The fact that a servant in charge of horses, who takes passage in the car in which the horses are being transported, knows that his employer made arrangements

contract for the shipment of live stock requiring the cattle owner to send a hand on the train to look after the stock while in transit, and stipulating that such hand is an employé of the railroad company, and that, as such, he assumes the risks of an employé, cannot alter the fact that such hand is an employé of the cattle owner, and not of the company, nor alter his relation of passenger as to the company. The company is therefore liable to him for injuries caused by the negligence of its employés. "The contract amounts to this: Knowing that a contract would be of doubtful validity that absolved the company, or limited its liability, as a common carrier of passengers, the contract was devised in which the passenger acknowledges himself to be an employé of the company, so as to contract for its limited liability upon such relation, and give it the semblance of legality. If the contract liability of a common carrier cannot be limited in express terms, and by a direct agreement, it cannot be done upon false or counterfeited relations." [2] So, the federal Revised Statutes,[3] which require railroad companies carrying mail to "carry, without extra charge," all mailable matter directed to be carried, "with the person in charge of the same," does not authorize any government agent to stipulate

with the railroad company for his transportation, does not charge him with knowledge that the contract between his employer and the company exempted it from liability for any injuries that might be received by him while traveling in the car. Coppock v. Railroad Co., 89 Hun, 186, 34 N. Y. Supp. 1039.

[2] Missouri Pac. Ry. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346. See, also, ante, § 214.

[3] Rev. St. U. S. § 4000.

with a railroad company for exemption from liability of the company for injuries to his subordinates, without their consent.[4] So, a contract between a telegraph company and a railroad company, in which the railroad company agrees to carry the employés of the telegraph company gratuitously, on condition that damages for injuries to employés "shall be waived and released," does not relieve the railroad company from liability for injuries caused by its negligence; nor will the fact that the employé of the telegraph company was riding on a pass issued under the contract relieve it from such liability, in the absence of a showing that the pass expressly stipulated therefor.[5] So, the fact that a railway company contracts with the federal government to furnish motive power and a crew to operate a special train carrying soldiers, which it receives from a connecting carrier, and that it shall be in no wise responsible for the condition of the cars or their appliances, does not relieve the company of the consequences of the negligence of its employés, or of the duty of furnishing an appliance that will keep the train attached to its locomotive; and it is liable for the death of a soldier happening by reason of its negligence in this respect.[6]

But a contract between an express company and a railroad company relieving the railroad company from liability for injuries to express messengers is binding on a messenger who, in his contract with the express

[4] Seybolt v. Railroad Co., 95 N. Y. 562, 571, affirming 31 Hun (N. Y.) 100.

[5] Elliott v. Railroad Co. (Super. Buff.) 11 N. Y. Supp. 691.

[6] Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

company, agreed to assume all risks of accident, and authorized the express company to enter into a contract with the railroad company exempting the latter from all liability for injuries to him.[7] In Canada it has been held that a contract between a railroad company and a news agency, that the railroad company shall not be liable for injuries to the persons composing the agency, their newsboys or agents, while being carried free under the contract, is binding on a newsboy vending papers on the train, though he was not a party to the agreement.[8]

[7] Louisville, N. A. & C. Ry. Co. v. Keefer (Ind. Sup.) 44 N. E. 796. An express company contracted with a railroad company for the transportation of its messengers and express matter, and agreed to assume all risks of damage that might arise out of the agreement, and especially to protect the railroad company against claims for damage to its employés or property, whether occurring from the negligence of the railroad company or otherwise. A messenger entered the employ of the express company under a contract which recited that the company should not "be liable by reason of any act or negligence of its agents, servants, or employés * * * or otherwise, causing any injury to his person or property, or causing his death" while in its employ; that he accepted the employment "with full knowledge and notice of all risks involved therein, which he assumes"; and that he released the company "from any and all liability for and in respect of any such damage, injury, or death by reason of negligence or otherwise." While in the company's employ, his death resulted from the alleged negligence of the railroad company. Held that, since the messenger was upon the railroad company's premises by the license given the express company, he was bound to know that his rights rested on a private contract to which he became subject in the performance of his duties for the express company, in its relations to the railroad company, and was chargeable with knowledge of the limitation on the railroad company's liability. Pittsburgh, C., C. & St. L. Ry. Co. v. Mahony (Ind. Sup.) 46 N. E. 917.

[8] Alexander v. Railway Co., 33 U. C. Q. B. 474.

§ 401. CONSTRUCTION OF CONTRACT.

The New York courts have held inflexibly to the rule that general words in the contract of a common carrier limiting its responsibility will not be construed as exempting it from liability for negligence, when they are capable of other construction. This rule applies both to carriers of persons and goods.[1] Under this rule, it has been held that a stipulation that the company "assumes no liability whatever in the matter," [2] or that the passenger waives all claims "for personal damages and injuries received when in the above train," [3] does not relieve the company from liability for injuries caused by the negligence of its servants.

But other courts have given a more liberal interpretation to such contracts. The supreme court of Maine

§ 401. [1] Kenney v. Railroad Co., 125 N. Y. 422, 26 N. E. 626, affirming 54 Hun, 143, 7 N. Y. Supp. 255. In this case a contract between an express company and a railroad company provided that the railroad company should be "expressly relieved from and guarantied against any liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise." Held, that the contract did not relieve the railroad company from liability to an action for injuries to an express messenger, caused by the negligence of its servants, but might be construed as an agreement by the express company to indemnify the railroad company on account of such action. A special contract exempting a carrier from loss occasioned by the negligence of its servants does not exempt the carrier from liability for its own negligence. Weinborg v. Steamship Co., 57 N. Y. Super. Ct. 586, 8 N. Y. Supp. 198.

[2] Blair v. Railway Co., 66 N. Y. 313.

[3] McElwain v. Railroad Co., 21 N. Y. Wkly. Dig. 21. The fact that a foreman of a street-car company had at previous times notified an employé, when giving him a pass, "that he had to ride at his own

has recently held that a condition that the passenger "assumes all risk of personal injury" is sufficiently comprehensive to cover all risks of personal injury, of every name and nature, including those arising from the negligence of defendant's servants.[4] So, in England it has been held that a stipulation that the passenger shall "travel at his own risk" exempts the company from liability for negligence, not only during actual transit, but also while going from its premises.[5] The supreme court of Indiana has recently held that in the interpretation of the language employed in a contract limiting a railroad company's liability for injuries to an express messenger, the court will be controlled by the usual rules for the ascertainment of the intention of the parties, looking to the words in their ordinary meaning, and not by the rule of strict construction adopted in New York.[6]

A contract between an express company and a railroad company, by which the express company assumes

risk, and that the company was entirely blameless," is not notice to the employé of a claim by the company of exemption from liability on all subsequent occasions on which he used the cars without pay. Pendergast v. Railway Co., 10 App. Div. 207, 41 N. Y. Supp. 927.

[4] Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069.

[5] Gallin v. Railway Co., L. R. 10 Q. B. 212. A similar ruling was made in McDonald v. Railway Com'rs, 13 Vict. Law R. 399. A clause in a steamship ticket relieving the company from "loss or damage" arising from any act, neglect, or default whatsoever exempts the company from liability for the loss of the passenger's life by negligence of defendant's servants in a collision with another ship. Haigh v. Packet Co., 5 Asp. 189, affirming Id. 47.

[6] Pittsburgh, C., C. & St. L. Ry. Co. v. Mahony (Ind. Sup.) 46 N. E. 917. At one time the New York rule prevailed in Indiana. See Indiana Cent. Ry. Co. v. Mundy, 21 Ind. 48.

"all risk of loss or damage arising out of or resulting from its operations, under this agreement," does not bind the express company to indemnify the railroad company against injuries to an express messenger resulting from its negligence. The express company assumed risks arising from "its" operations under the agreement; that is, its own losses, and losses for which it would be responsible. It was not liable, in any sense, to the messenger, for his injuries caused by the negligence of the railway company in failing to keep its bridges and roadbed in repair, and his injuries would not be a loss to the express company.[7]

§ 402. RELEASE AND DISCHARGE AFTER INJURY.

A cause of action sounding in tort may be discharged by agreement of the wrongdoer and the sufferer. The validity of such an agreement depends on the general principles governing the law of contracts.

It may be stated as a general proposition that a release of a right of action sounding in tort must have all the requisites of a valid contract. It must be executed

[7] San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839. A provision in a bill of lading given to a shipper of stock, that the company will not be liable on account of the carriage of "said stock" beyond its own line, does not relieve it from liability for wrongs, beyond its own line, to the drover accompanying the stock on a pass issued as an incident to the bill of lading for the stock. Gulf, C. & S. F. R. Co. v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391. A passenger who pays full fare for a ticket is not bound by any conditions therein stated to be in consideration of the reduced fare at which the ticket is sold. Anderson v. Railway Co., 17 Ont. 747, affirmed 17 Ont. App. 480.

by all necessary parties, be based on a valid consideration, and must show a completed intention to discharge the particular cause in issue.[1] Under a statute which declares that the personal property of married women shall be their sole and separate property, subject to their control, a married woman can execute a valid release of damages for injuries to her person, without joining her husband in the release.[2] An attorney at law, as such merely, cannot settle a suit, and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action.[3]

The Civil Code of Louisiana[4] declares that "a transaction or compromise is an agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent." Under this provision, it is essential to the validity of a compromise that the particular lawsuit which is to be prevented or put an end to should be specially mentioned in it; and, to have the force of things adjudged, it must be perfect and complete in itself, and nothing should be left for ascertainment by parol proof.[5]

It is a familiar principle of the common law that a release or discharge of one of two or more joint tort feasors by the voluntary act of the injured person operates as a discharge of all.[6]

§ 402. [1] Jag. Torts, p. 310.

[2] Blair v. Railroad Co., 89 Mo. 383, 1 S. W. 350.

[3] Barrett v. Railroad Co., 45 N. Y. 628.

[4] Rev. Civ. Code La. art. 3071.

[5] Lampkins v. Railroad Co., 42 La. Ann. 997, 8 South. 530.

[6] Barrett v. Railroad Co., 45 N. Y. 628. Where a passenger, injured

§ 403. SAME—RESCISSION.

The validity of releases of rights of action for personal injuries is frequently attacked. The grounds generally relied on to overthrow such releases are: (1) Mental incapacity; (2) inadequacy of consideration; (3) fraudulent misrepresentations.

As to mental incapacity, the United States supreme court has recently ruled that one who is prostrated by disease, and suffering pain and misery, and who is to some extent under the influence of morphine, may deny knowledge of the contents of a release signed by him, through misrepresentation of its contents, without reading it.[1] But the fact that plaintiff is ill at the time of executing a release, though it has an important bearing

in a collision between his car and the car of another company, sues both companies, and receives a sum of money from one of them in compromise of his claim, his right of action against the other is gone also; and he will be estopped from showing that the one paying the money was not in fact at fault, but that the injury was owing solely to the negligence of the other. Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165. A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. But, where there is a suit pending against several joint tort feasors, the dismissal of the suit against one will not bar the action against the others. West Chicago St. R. Co. v. Piper (Ill. Sup.) 46 N. E. 186. The common-law rule as to the effect of the release of one of several joint tort feasors has been changed by statute in some of the states.

§ 403. [1] Union Pac. Ry. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843; s. c. 12 C. C. A. 598, 63 Fed. 800. A release of a right of action for personal injuries is not binding if the person executing the release was unconscious, and not in his right mind, at the time, or if he was suffering from physical pain, fever, and mental anguish to such an extent as to incapacitate him to comprehend the character, ex-

on the question of capacity to enter into the contract, is no proof of fraud, where he admits of a perfect understanding of the contract, and of its effects on his rights.[2] If a person not insane seeks to avoid a release of a right of action on the ground that her mental faculties were temporarily impaired, the burden of proof is on her to show the mental incapacity, and not on the other party to show her mind was not impaired.[3]

As to inadequacy of consideration, the general rule undoubtedly is that inadequacy of the consideration paid to obtain a release of a claim for personal injuries is not ground for setting aside the release in equity, in the absence of fraud or mistake.[4] But, where both parties erroneously believe that the injuries are not serious, a release of a right of action for personal injuries given for an insignificant sum will be set aside in equity.[5] So, a settlement of a claim for a grave personal injury for an insignificant sum is not binding when advantage is taken of the loneliness, poverty, and sickness of plaintiff, a woman, whose ignorance is played upon by one of defendant's agents, on whom she relied, and in whom she trusted.[6]

As to fraudulent representations, the general rule, of course, is that fraud vitiates everything it touches. A release of a right of action for personal injuries obtain-

tent, and consequences of the contract. International & G. N. Ry. Co. v. Brazzil, 78 Tex. 314, 14 S. W. 609.

[2] McFarland v. Railway Co., 125 Mo. 253, 28 S. W. 590.

[3] Chicago W. D. Ry. Co. v. Mills, 91 Ill. 39.

[4] Lumley v. Railway Co., 71 Fed. 21.

[5] Blair v. Railroad Co., 89 Mo. 383, 1 S. W. 350.

[6] Stone v. Railway Co., 66 Mich. 76, 33 N. W. 24.

ed from an illiterate woman during an illness consequent on such injuries by a physician attending her at defendant's request, on the representation that it is a mere receipt for money expended in her behalf, is not binding on her.[7] But a statement made to an injured person by a physician employed to attend on him by the defendant, as to the nature of the injuries, or as to the length of time it will take to recover, is a mere statement of opinion; and the fact that the physician was in error is no ground for setting the release aside, unless he knew the statement to be false when he made it.[8]

In Missouri it is held that a release alleged to have been obtained by fraudulent representations as to its contents, made to one able to read, but claiming to have been in a dazed condition, can be set aside only in a suit in equity, after a return, or an offer to return, the consideration; and, until so set aside, the release will be deemed valid and binding at law.[9]

[7] Eagle Packet Co. v. Defries, 94 Ill. 598.

[8] McFarland v. Railway Co., 125 Mo. 253, 28 S. W. 590; Homuth v. Railway Co., 129 Mo. 629, 31 S. W. 903; Nelson v. Railway Co., 61 Minn. 167, 63 N. W. 486.

[9] Och v. Railway Co., 130 Mo. 27, 31 S. W. 962. It is doubtful whether this is the doctrine in other Code states, where distinctions between actions at law and suits in equity have been abolished; and it is believed that the validity of the release may be attacked in the action for damages, without first bringing an equitable action to rescind the release.

§ 404. SAME—RATIFICATION AND LACHES.

If a person executes a release while non compos mentis, and afterwards, when he has been restored to sound mind, retains and uses the consideration of the release, without offering to restore it, his conduct may furnish satisfactory, and it may be conclusive, evidence of ratification. It is not necessary that the affirmance be as solemn as the original act itself. Acquiescence, with other circumstances, may establish ratification.[1] But it has been held that, where an injured person was mentally incompetent when he executed a release of his right of action, the mere fact that he retained and used the money paid him when the release was executed does not amount to a ratification of the release, unless he knew that he executed the release, its nature and character, and where the money came from.[2]

§ 404. [1] Gibson v. Railroad Co., 164 Pa. St. 142, 30 Atl. 308. In this case a passenger injured in a railroad accident executed a release, and received $240 therefor, within a few hours after he had been operated on by the company's surgeon. He afterwards claimed that the release had been executed while he was still under the influence of anæsthetics, and that he had no consciousness of the act. He did not, however, allege any fraud upon the part of the railroad officials in procuring the release. The evidence showed that, after he had been restored to sound mental condition, he knew that he had the money, and he also had knowledge of the main facts of the settlement. He did not offer to return the money, and he permitted the railroad company to pay his doctor and hospital bills, in accordance with the terms of settlement. Held, that his conduct constituted an affirmance of the release.

[2] International & G. N. Ry. Co. v. Brazzil, 78 Tex. 314, 14 S. W. 609. But one who has compromised his claim for damages, and afterwards uses up the amount paid him, cannot be heard to assert fraud and

A delay of over three years before bringing suit to set aside a release of a claim for personal injuries is laches, which will bar the relief, and plaintiff's poverty does not excuse the laches.[3]

deceit in the compromise, when he does not tender back the amount he has received. Stewart v. Railway Co., 62 Tex. 246.

[3] Lumley v. Railway Co., 71 Fed. 21.

CHAPTER XXIX.

CARRIERS BY WATER.

§ 405. No Distinction in Principle between Carriers by Water and by Land.
406. Duty to Carry to Destination without Delay.
407. Accommodations.
408. Authority and Power of Master.
409. Duty to Passengers in Shipwreck.
410. Admiralty Jurisdiction.
411. Same—Liability of Vessel.
412. Liability of Master.
413. Statutory Regulations—Emigrant or Steerage Passengers.
414. Same—Steam Vessels.
415. Same—Carrying Excessive Number of Passengers.
416. Same—Carrying Explosives.
417. Statutory Limitation of Vessel Owners' Liability.
418. Same—To What Claims Statute Extends.
419. Same—To What Waters and Vessels Applicable.
420. Same—Ascertaining Value of Vessel.

§ 405. NO DISTINCTION IN PRINCIPLE BETWEEN CARRIERS BY WATER AND BY LAND.

A carrier by water is not absolutely bound to safely transport his passengers, and his liability is governed by the same principles which apply to carriers by land.

The principles governing the liability of carriers of passengers are of universal application, and are not confined to carriers of passengers by land. In the foregoing pages reference has been freely made to cases involving passenger carriers by water. A separate chapter on this subject is added only because the peculiar

dangers incident to carriage by water and the statutes governing the duties of carriers by water have given rise to a number of special cases, which cannot very well be classified elsewhere under the general headings of this work.

A carrier of passengers by water is not bound absolutely to furnish a seaworthy vessel, any more than a carrier of passengers by land is absolutely bound to furnish a roadworthy vehicle. As was said by an English court in a leading case:[1] "No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen; and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action on it." But a vessel must be constructed strong enough to withstand storms of such violence as may reasonably be anticipated to occur in the waters which she is designed to navigate.[2]

§ 405. [1] Readhead v. Railway Co., L. R. 4 Q. B. 379, 390.

[2] In re Myers Excursion & Navigation Co., 57 Fed. 240. A barge used to carry excursion parties on New York harbor and neighboring waters is defective and unseaworthy, if not in a condition to withstand, without serious injuries to her passengers, the violent thunderstorms which are of frequent occurrence in that locality. Id. A passenger on an ocean vessel, while walking along the companion way on her way to the deck, was thrown down by a sudden and unexpected lurch of the vessel, and her wrist was broken. Held, that the question whether the carrier was negligent in failing to provide a rail to guard passengers from falling was for the jury; there being evidence that many other vessels had similar places protected by a rail, and that soon after the accident one was put in the vessel in question. American S. S. Co. v. Landreth, 108 Pa. St. 264, 102 Pa. St. 131. A ferry company is not guilty of negligence in covering the steps of its ferryboat with a brass plate, corrugated save where turned

So, it is negligence for a river passenger steamer to approach the locality of a railroad drawbridge at night at such a rate of speed as to prevent her complete control by the master, especially when there is no uniformity in the method of placing lights to indicate whether the draw is open or closed.[3] So, it is negligence to open a hatch in the passageway for steerage passengers, without guarding the opening, or placing lights near, to enable steerage passengers to perceive the unusual danger.[4] The owners of excursion boats used for night excursions are bound to use proper precautions to guard against the natural mistakes of passengers while on board; and where a door opening on a stairway leading to the hold is so placed as to be easily mistaken for the doorway to the stairs leading to the upper deck, the owners are guilty of negligence in not having the doorway so effectually lighted as to warn a passenger

over the edge of the step, which is smooth and slippery, and the company is not liable for injuries to a passenger who slipped on the edge of the step. Crocheron v. Ferry Co., 56 N. Y. 656, reversing 1 Thomp. & C. (N. Y.) 446. A steamboat company is not liable for an injury to a passenger who slipped on the stairway of one of its boats, alleged to have been slippery, where it appears that the stairway was in good order, constructed in the best possible manner, covered with polished brass, having stars raised in the surface to prevent persons from slipping. Hughes v. Steamboat Co., 11 Misc. Rep. 65, 31 N. Y. Supp. 1012.

[3] The St. Nicholas, 49 Fed. 671. In this case it was further held that where such a boat, which carries no lookout at the bow, as required by rule 10 of the board of supervisors' regulations, collides with a drawbridge at night, and thus causes injuries to her passengers, the burden is upon her to show that the want of a lookout did not in any manner contribute to the accident.

[4] Behrens v. The Furnessia, 35 Fed. 798.

of his mistake as soon as he faced and was about to step into the opening.[5]

A steerage passenger has the right to be up and about the steerage, if she is able and so inclined; and it is the duty of the ship to keep the steerage room a safe place for her to walk about or sit down in, so far as the utmost care and skill of a cautious and prudent person would provide under like circumstances. Ordinarily, the steerage passengers are entitled to the use of steerage room, free from any inconvenience or risk from freight therein. Cases may arise in which the passengers are so few in number, in proportion to the size of the room, that there can be no objection to some portion of it being used as a freight room. But in such case the carrier takes the risk, and it is his duty to stow and secure such freight that the passenger will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk,—for instance, to remain in their berths during the whole voyage, or any unusual portion of it.[6]

It is negligence in the proprietors of a steamboat to permit a passway used by passengers in leaving the boat to be exposed to escaping steam, and a passenger who is scalded by the escaping steam may recover therefor.[7]

[5] The Pilot Boy, 23 Fed. 103.

[6] The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572. Hence, to stow tin in the steerage so as to make a pile six feet high, three feet wide, and six feet long, without taking any precautions to prevent the top tiers from sliding off in rough weather, is negligence, which renders the vessel liable for injuries to a steerage passenger who was struck by some of the top tiers, which rolled off in rough weather.

[7] Gruber v. Railroad Co., 92 N. C. 1. A carrier by steamer who in-

§ 406. DUTY TO CARRY TO DESTINATION WITHOUT DELAY.

Where a carrier has undertaken to transport a passenger between distant ports, the law imposes on the carrier, independent of any special agreement, the duty of carrying the latter through without unreasonable detention.[1] A common carrier who sells passage tickets, and agrees to have his vessel at a certain point at a certain date, is not excused for his breach of contract by the fact that the vessel was disabled by stress of weather.[2] Nor does the loss of a vessel through an act of God absolve the carrier from fulfilling his contract with a passenger. It is his duty to provide another vessel.[3]

vites passengers, either expressly or by implication, to use a plank placed from a boat to a wharf as a proper mode for reaching his vessel, is liable for any accident which may happen to one of his passengers while using the plank, by reason of a defect therein. Timbrell v. Waterhouse, 6 N. S. W. 77.

§ 406. [1] Van Buskirk v. Roberts, 31 N. Y. 661.

[2] Cobb v. Howard, 3 Blatchf. 524, Fed. Cas. No. 2,924. In this case it was said: "Until the passenger becomes connected with the vessel as a passenger on board, he is in no way subject to her casualties and misfortunes, occurring through stress of weather or otherwise. He is a stranger to her. The contract bound the owner to have his vessel at the place and time designated. He had stipulated that as part of the consideration for the price paid, and had assumed the responsibility of performance; and the failure operated as a breach of the engagement, and made him liable to return the price paid. The winds and waves, or the weather, are no excuse for the nonfulfillment of the contract as to the time of the commencement of the voyage. If those circumstances had been intended as elements of it, they should have been expressly provided for by the owner, and then all parties concerned would have understood."

[3] Williams v. Vanderbilt, 28 N. Y. 217, affirming 29 Barb. (N. Y.)

A carrier of passengers is liable for failure to land them at the place agreed upon, though the vessel is prohibited from landing at that port by injunction.[4]

§ 407. ACCOMMODATIONS.

The undertaking to carry a passenger, either in the steerage or cabin, between two ports separated by several days of travel, includes the furnishing of the passenger with a berth, unless there is a fair understanding beforehand that the passenger is to make the voyage without it; and this is particularly so in the case of a female passenger traveling alone.[1] Of course, where a passenger has bargained for the exclusive use of a stateroom for himself and wife, the carrier is liable if he afterwards assigns another passenger to that state-

491, disapproving Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Bonsteel v. Same, 21 Barb. (N. Y.) 26. See, also, ante, § 274. But, where tickets are sold for transportation by sea from San Francisco to New Orleans via the Isthmus of Nicaragua, a delay of 10 days in the arrival of the connecting vessel on the Atlantic side does not give rise to a cause of action, where the delay was caused by a violent storm at sea. Van Horn v. Templeton, 11 La. Ann. 52. The fact that a steamer takes steerage passengers on board at a cholera infected port is not a breach of contract with a cabin passenger, or any breach of duty that the ship owes him. The legal right of the steerage passengers to transportation is the same as that of the cabin passengers. It was doubtless the duty of the owners, upon the outbreak of cholera at the port of departure, to take all known precautionary measures for the purification of the ship, and to prevent from embarking all persons, whether of the crew, steerage, or other passengers, who, on examination, might show reasonable probability of infecting the ship. The Normannia, 62 Fed. 469.

[4] Post v. Koch, 30 Fed. 208.

§ 407. [1] The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572.

room.[2] A passenger on a steamer who is denied first-class accommodations to which he is entitled under his ticket, and who is compelled to pass the night without any accommodations whatever, exposed to the inclemency of the weather, by reason of which he suffers inconvenience and hardship, and contracts a severe cold, and is not given anything to eat for nearly 24 hours, is entitled to recover damages, though these privations are to some extent self-inflicted; first-class accommodations having been offered him on condition that he pay fare, and he having the money with which to do so.[3]

But the mere fact that a passenger was not furnished so large a quantity of good and fresh provisions as is usual under the circumstances gives him no right of action, unless he has sustained actual injury as a consequence thereof. "There is no real ground of complaint —no right of action—unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain, who does not provide all that he ought." [4]

§ 408. AUTHORITY AND POWER OF MASTER.

The captain has the absolute control over the passengers and crew. The contract with the passenger is to carry, board, and lodge him, and the passenger is to obey all the captain's reasonable orders,—in an emergency, even to work the ship, or defend it by force of

2 Morrison v. The John L. Stephens, Hoff. Op. 473, 17 Fed. Cas. 838.

3 The Willamette Valley, 71 Fed. 712.

4 Young v. Fewson, 8 Car. & P. 55.

arms, if necessary.[1] In the language of Mr. Justice Story:[2] "The authority of a master at sea is necessarily summary and often absolute. For the time, he exercises the right of sovereign control; and obedience to his will, and even his caprices, becomes almost indispensable. If he chooses to perform his duties, or to exert his office, in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is nevertheless responsible to the law; and, if he is guilty of gross abuse or oppression, I hope it will never be found that courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment."

One of the best illustrations of the scope of the captain's authority is to be found in a case decided early in the present century, during the Napoleonic wars.[3] A strange sail being descried, supposed to be an enemy, the captain mustered all hands on deck, and assigned to every one his station. The passengers were ordered on the poop, where they were to fight with small arms. One of them, conceiving himself to have been ill used some time before in being forbidden to walk on the

§ 408. [1] King v. Franklin, 1 Fost. & F. 360.

[2] Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575.

[3] Boyce v. Bayliffe (1807) 1 Camp. 58. However, when it came out that plaintiff had been kept all night in irons on the poop, his lordship clearly held that defendant had exceeded the limits of his authority.

poop, refused to obey, but offered to fight in any other part of the ship. The captain ordered him to be carried on the poop, and he was kept there in irons all night. Next morning no enemy appeared. Lord Ellenborough said: "A captain has authority to do what is necessary for the safety of those on board. On the approach of an enemy, he has a right to assign them all a station, which it is their duty to accept. As plaintiff had refused to obey the orders given him, perhaps his confinement might be necessary to the discipline of the crew and the security of the vessel, and, if so, would be justifiable in law."

As an incident to their right to control and manage a steamboat, the officers have a right to reserve a table for themselves exclusively; and if any passenger should persist in remaining at it after proper notice that it was thus reserved, and that provision would be made for him elsewhere, they would have a right to remove him by force, so far as it might be necessary to use it.[4]

In the case of the appearance of a dangerous or infectious disease, there can be no doubt that the master of a ship has authority, and that it is his duty, to isolate the sick person from all others on board, so far as it can be done with a reasonable regard to his comfort or welfare, so as to protect from infection, as far as possible, the other passengers and crew. The fact that the passenger holds a first-class ticket, and is entitled to a first-class cabin, with the comfort and accommodations per-

[4] Ellis v. Steamship Co., 111 Mass. 146.

taining thereto, does not abridge the master's authority in this respect.[5]

But the authority of the captain is based upon necessity, and is limited to the preservation of necessary discipline and the safety of the ship. Before the captain can order a passenger to be confined to his cabin during the voyage, there must be some act calculated, in the apprehension of a reasonable man, to interfere with the safety of the ship or the due prosecution of the voyage. The necessity for exercising a due control over the use of this arbitrary authority is all the greater because it is exercised on the high seas, on a sort of floating territory, perhaps thousands of miles from land, without any opportunity, until weeks or months afterwards, of appealing to the law for redress, in case the authority should be abused.[6] To quote again the classic language of Mr. Justice Story:[7] "In respect to passengers the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for rea-

[5] The Hammonia, 10 Ben. 512, Fed. Cas. No. 6,006. But the duties which the law imposes on common carriers of passengers by water, in relation to their treatment and accommodation of passengers during the voyage, necessarily cease on its termination. If, during the voyage, a contagious disease breaks out on the vessel, and on her arrival at port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable to the city for the expenses incurred thereby. City of New Orleans v. The Windermere, 12 La. Ann. 84.

[6] Aldworth v. Stewart, 14 Law T. (N. S.) 862.

[7] Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575, where a captain was held liable for ill treating passengers on board his vessel. See, also, to same effect, Block v. Bannerman, 10 La. Ann. 1.

sonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which is the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravate every evil, and endeavors, by the excitement of terror and cool malignity of conduct, to inflict tortures upon susceptible minds." Hence the confinement of a passenger to his cabin for a period of seven days is not warranted by the fact that he insolently put his hand to his nose to the captain during a dispute as to the food.[8] So the mere want of polished manners at table does not justify the captain in excluding a passenger therefrom, but a threat by the passenger to use violence to the captain will justify the exclusion.[9]

§ 409. DUTY TO PASSENGERS IN SHIPWRECK.

In cases of shipwreck, the sailors have no right, even for the purpose of saving their own lives, to deliberately sacrifice the lives of passengers. This proposition was

[8] Aldworth v. Stewart, 14 Law T. (N. S.) 862.

[9] Prendergast v. Compton, 8 Car. & P. 454. Calling the captain, "The landlord of a hotel,' during a dispute as to the right of passengers to play cards in a certain part of the vessel, will not warrant the imprisonment of a passenger in irons. King v. Franklin, 1 Fost. & F. 360.

laid down in a very remarkable case decided in the federal circuit for the district of Pennsylvania in 1842.[1] A vessel carrying passengers struck an iceberg, and was wrecked. Some of the crew and some of the passengers got in the longboat. A wind came up, and the crew of the longboat then threw overboard 14 male passengers to save the longboat from sinking. On the following day, the longboat was picked up by another vessel, and all on board were saved. One of the crew was indicted for manslaughter, and convicted. The defense contended that the persons in the longboat had been reduced to a state of nature, and that the sailors were justified in sacrificing the lives of the passengers to save their own. The court, however, held otherwise, Mr. Justice Baldwin saying: "The passenger owes no duty but submission. He is under no obligation to protect and keep the conductor in safety; nor is the passenger bound to labor, except in cases of emergency, where his services are required by unanticipated and uncommon danger. The passenger stands in a position different from that of the officers and seamen; it is the sailor who must encounter the hardships and perils of the voyage. Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves for safety to the small boats; for imminence of danger cannot absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no

§ 409. [1] U. S. v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383.

reason why the law does not still remain the same; the passenger, not being bound either to labor or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailors. The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish (Acts xxvii. 31); but, if there are more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers. The sailors and passengers in fact cannot be regarded as in equal positions. The sailor owes more benevolence to another than to himself; he is bound to set a greater value on the life of others than on his own; and, while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him. This rule may be deemed a harsh one to the sailor, who may have thus far done his duty; but when the danger is so extreme that the only hope is in sacrificing either a passenger or a sailor any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?" It was further held that, even if this were not so, and the sacrifice of some were necessary to save the balance, it was the duty to select the victims by lot from both sailors and passengers, provided there is time to do so.

§ 410. ADMIRALTY JURISDICTION.

The admiralty has jurisdiction of personal wrongs and torts committed on a passenger, on the high seas, by the master of a ship.[1] And a contract to transport a passenger in a ship or vessel on the high seas or on tide waters is a maritime contract, and within the jurisdiction of the admiralty.[2] The mere fact that the contract of transportation includes, as incidental, land carriage, in no way impairs the right of the passenger to sue in the admiralty for the alleged commission of a maritime tort on the high seas.[3]

§ 411. SAME—LIABILITY OF VESSEL.

One of the peculiar features of the admiralty jurisdiction is that not only may the owners be held personally liable in damages to an injured passenger, but in addition the vessel itself may be subjected to the passenger's demand in an action in rem. Ships engaged in carrying passengers for hire on the high seas stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage money being equivalent to the freight; and therefore, on a breach of passenger contract, and damages resulting, the ship, as well as the owner, is

§ 410. [1] Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575.

[2] Stone v. The Relampago, Fed. Cas. No. 13,486.

[3] The Willamette Valley, 71 Fed. 712, citing The Pacific, 1 Blatchf. 585, Fed. Cas. No. 10,643; Plummer v. Webb, 4 Mason, 384, Fed. Cas. No. 11,233; The Moses Taylor, 4 Wall. 411.

bound to respond; and all the reasons in the maritime law for charging a ship, in case of a breach of contract for affreightment of goods and merchandise, apply with equal force in the case of a breach of passenger contract.[1] Thus, where a passenger is put on short allowance, in violation of the passage contract, the vessel may he held liable.[2] So, an injury to a passenger on board a passenger ship, happening in consequence of the negligence on the part of the owner, officers, or mariners of the vessel, is both a breach of the contract for transportation and a tort, entitling the injured passenger to compensation, and to a lien therefor upon the vessel.[3] It has even been held that a cause of action for the death of a passenger on shipboard, caused by the negligence of the ship's officers, is a cause of action arising on contract, survives to the administrator, and may be sued for in rem.[4]

In some of the states, statutes exist making steamboats and other water craft navigating waters within or bordering on the state liable for injuries inflicted

§ 411. [1] The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643; Stone v. The Relampago, Fed. Cas. No. 13,486. For a breach of contract to carry a passenger from New York around Cape Horn to San Francisco for an entire compensation, the passenger may maintain a libel in admiralty, though the breach consists in a failure to provide the stipulated accommodations by reason of which he refuses to embark; and in such a case the passenger is entitled to recover back his passage money. The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643.

[2] The Aberfoyle, 1 Abb. Adm. 242, Fed. Cas. No. 16.

[3] The Wasco, 53 Fed. 546. The vessel itself may be proceeded against for an assault on a passenger by the master while acting in the line of his employment. McGuire v. The Golden Gate, McAll. 104, Fed. Cas. No. 8,815.

[4] The City of Brussels, 6 Ben. 370, Fed. Cas. No. 2,745.

by any of its officers or employés. Under such a statute, the boat is treated as a person, and whatever action would lie against a person for an injury will lie against the boat, the kind of action to be determined by the nature of the injury.[5]

§ 412. LIABILITY OF MASTER.

By a rule peculiar to the maritime law, the master is liable for the negligent acts of an employé, while engaged under his authority, to the same extent as if he were the ultimate principal, who is ordinarily bound to respond in damages for such negligence. And this rule applies without any distinction whether the officers and men were appointed by the owners or himself. Hence the master is liable for the negligence of the chief steward in leaving an ordinary drinking cup, containing a poisonous substance, in a passenger's cabin, where a child can get it, and drink from it.[1]

Of course, the master, as well as the owner of the vessel, is personally responsible for his own negligence and misfeasance;[2] as, for example, indecent and inhumane conduct of himself, and of his crew excited by him, towards a passenger.[3]

[5] Loy v. The Aubury, 28 Ill. 412, citing The Champion v. Jantzen, 16 Ohio, 91; The Huron v. Simmons, 11 Ohio, 458.

§ 412. [1] Kennedy v. Ryall, 67 N. Y. 379, affirming 40 N. Y. Super. Ct. 347.

[2] White v. McDonough, 3 Sawy. 311, Fed. Cas. No. 17,552.

[3] Keene v. Lizardi, 5 La. 431.

§ 413. STATUTORY REGULATIONS—EMIGRANT OR STEERAGE PASSENGERS.

At various times, congress has enacted laws regulating the mode of the transportation of steerage passengers to this country. All the various acts on this subject were codified and superseded by the Revised Statutes of 1878,[1] and the provisions of the Revised Statutes have in their turn been superseded by the act of congress approved August 2, 1882.[2] Section 1 of that act prescribes the space and compartments to be allotted to steerage passengers. Section 2 contains rules and regulations as to berths and their occupancy by steerage passengers. Section 3 contains provisions for light, air, and ventilation of the steerage compartments, for the cooking apparatus, and for water closets. Section 4 prescribes the food and water to be allowed passengers. Section 5 provides for hospital compartments and medical and surgical attendance. Section 6 empowers the master to make regulations to promote the discipline, health, etc., of passengers. Section 7 prohibits officers and seamen from visiting the part of the vessel assigned to the use of steerage passengers, except with the master's permission.

The general purpose of all these various acts is the same. As said by Chief Justice Taney [3] of the acts of 1847 and 1848, regulating the mode of transportation of steerage passengers: "The act * * * is intend-

§ 413. [1] Sections 4252–4272.

[2] 22 Stat. 186.

[3] U. S. v. The Anna, Taney, 549, Fed. Cas. No. 14,458.

ed, not only for the protection or convenience of passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food; and when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience, will justify the master in violating the provisions of the statute." [4]

[4] In this note are collected the cases on this subject decided under statutes prior to that of 1882. Act Cong. March 2, 1819, declares that if more than two passengers for every five tons of any vessel, according to the custom-house measurement, shall be brought into the United States, except the men employed in navigating the vessel, the master and owner shall forfeit $150 for every passenger above that number; and, if such excess amounts to 20 passengers in the whole, the vessel shall be forfeited. Held that, in estimating the number of passengers in a vessel, no deduction is to be made for children or persons not paying. U. S. v. The Louisa Barbara, Gilp. 332, Fed. Cas. No. 15,632. Under Act Cong. March 3, 1855, § 1 (10 Stat. 715), a mate who is appointed master at a foreign port, and leaves the port with the intent to bring certain passengers to the United States, and does bring them, in excess of the number permitted by that statute, is liable to the fine imposed on masters, though the agreement with the passengers had been made by the former master, if defendant had knowledge of the facts, and opportunity to annul the illegal contract before leaving the foreign port. U. S. v. Morton, 1 Low. 179, Fed. Cas. No. 15,882. A space on a vessel is not appropriated to the use of passengers unless it is given up to their exclusive use, and therefore the dining saloon of a steamship carrying Chinese passengers from Hong Kong to Portland, Or., in which such passengers were allowed to go and come during the day, but to which none of them were allotted or assigned, and in which they neither ate nor slept, was not a space ap-

The passenger act of 1882, which requires emigrant passengers to be furnished with provisions equal in value to one and one-half navy rations of the United States, does not require navy rations in kind, but rations equal to navy rations in value.[5] But the passengers cannot recover the penalty provided by the act, if the evidence does not show the money or nutritive value of the provisions furnished, or their inequality in value to one and one-half navy rations, though they may have been poor in quality.[6]

propriated to their use, within Rev. St. U. S. § 4252 (Act March 3, 1855; 10 Stat. 715). U. S. v. Nicholson, 12 Fed. 522. Rev. St. U. S. § 4253, which prescribes a penalty against a master who shall take on board his vessel a greater number of passengers than allowed by law, "with intent to bring such passengers to the United States," is violated when an excessive number of passengers get on board, openly, in the usual way, and not clandestinely, of a vessel bound for the United States; and it is not necessary to show that the master knew that he had taken on board an excessive number. It is the master's duty to ascertain how many passengers he has on board before leaving port. U. S. v. Thomson, 12 Fed. 245. Rev. St. U. S. § 4255 (Act March 3, 1855, § 2), relating to the construction of berths on vessels carrying emigrants to the United States, applies only to sailing vessels, and not to steam vessels, in view of the fact that section 10 of the act declares that the space appropriated to the use of steerage passengers on steam vessels shall be subject to the supervision and inspection of the collector of customs. The Devonshire, 13 Fed. 39.

[5] The Prinz Georg, 23 Fed. 906. The master of a vessel carrying emigrant passengers, the provisions for whom have spoiled during the voyage, has no right to put them on short rations after touching at a port where fresh provisions could be obtained. Id.

[6] O'Carroll v. The Havre, 45 Fed. 764. Instead of furnishing the amount and quality of food stipulated in the tickets of emigrant passengers, the master gave them unwholesome and insufficient provisions; fresh water was not furnished them as agreed upon; and the water-closets for female passengers were not decently arranged and

Until a fine has been imposed on the master of a vessel in a criminal prosecution for failure to provide the emigrant passengers with the accommodations required by the passenger act, no libel can be maintained against the vessel for the amount of such fines.[7] "Where there is a forfeiture for acts done which attaches solely in rem, or where there is both a forfeiture in rem and a personal penalty, or where a penalty is imposed upon a master or owner of a vessel for acts done or omitted by the owner or master, and the same is made a lien upon the ship, and is one that can be recovered in an action of debt, then the practice has been, and the law is, that the proceeding in rem stands independent of and unaffected by any proceeding in personam. In none of these cases, however, has it been held that, where a statute provides that any acts done or omitted to be done by the master of a vessel shall be a misdemeanor punishable either by fine or imprisonment, and the vessel is made secondarily and not primarily liable for the amount of the penalty, a court of admiralty may enforce such secondary liability by a

inclosed, and were in a disgustingly filthy condition. For the insufficiency of the water-closets, the ship was convicted under the passenger act of 1882, and fined $250. Held, that damages should be allowed the passengers, $50 to each for breach of contract as to provisions, and $50 additional to each female for breach as to water-closets. O'Carroll v. The Havre, 45 Fed. 764. Victoria, B. C., is territory contiguous to Astoria, Or., within the meaning of Act Cong. Aug. 2, 1882, § 12, which provides against the overcrowding of vessels carrying emigrant passengers from foreign countries, "except places in foreign territory contiguous to the United States." The Danube, 55 Fed. 993.

[7] The Candace, 1 Low. 126, Fed. Cas. No. 2,379; The Sidonian, 38 Fed. 440; The Nellie May, 50 Fed. 605.

proceeding in rem, without reference to the trial and conviction of the offender." [8]

§ 414. SAME—STEAM VESSELS.

Rev. St. U. S. tit. 52, c. 1, contains minute provisions for the inspection and licensing of vessels propelled by steam. Section 4463 requires steamers carrying passengers to have in service a full complement of officers and crew. Section 4464 requires the inspectors to fix the number of passengers which may be carried by each vessel. Sections 4465 and 4466 prohibit the carrying of a greater number of passengers than fixed by the inspectors. Sections 4467 and 4468 require the master to keep a correct passenger list. Sections 4470 and 4471 prescribe the precautions against fire which must be taken on passenger steamers. Sections 4472–4476 prohibit the carrying of certain explosive and inflammable articles, like nitroglycerin, and regulate the carrying of other inflammable substance, like loose hay, cotton, etc., on passenger steamers. Section 4477 requires night watchmen to be on duty. Sections 4481–4487 relate solely to river steamers. Sections 4481–4483 require them to be provided with lifeboats, life-preservers, fire buckets, and axes. Section 4484 requires them to be provided with permanent stairways leading to the upper deck. Section 4485 provides for the accommodation of deck passengers. Section 4487 requires such steamers to anchor when navigation is rendered unsafe by darkness or fog. Section 4488 requires ocean

[8] The Sidonian, 38 Fed. 440.

and lake steamers carrying passengers to be provided with lifeboats and other life-saving apparatus.[1]

The failure of a carrier by steamboat to comply with any one of these various provisions, causing injury to a passenger, would of itself subject him to a charge of negligence. Thus, if a boiler explosion occurs in consequence of a pressure of steam in excess of that allowed in the inspector's certificate, the steamboat owner is liable for injuries to a passenger by reason of the explosion.[2] But the fact that a carrier by steamboat has fully complied with the act of congress as to the safeguards to be used for the protection of passengers does not clear him from liability, or remove a presumption of negligence established by the evidence. His liability is not in any manner limited or restricted by that act; but a failure to comply with its provisions would, of itself, subject him to a charge of negligence.[3] Congress has not professed to impair or to take away the common-law right of action by persons injured through unskillfulness or negligence of the owner or master of a vessel. Thus, an inspection of the boiler of a steam vessel by the proper United States inspector, as required by the federal statute, and a certificate of inspection that, in his opinion, the vessel, her boiler and machinery, come up to the act of congress, is not conclusive, and does not exonerate the owner of the vessel for his negligence in permitting the boiler to become de-

§ 414. [1] Some of the states also have statutes on this subject. Rev. St. Me. c. 52, p. 497, contains elaborate provisions for the safety of passengers on steamers on inland waters.

[2] Carroll v. Railroad Co., 58 N. Y. 126.

[3] Caldwell v. Steamboat Co., 47 N. Y. 282, affirming 56 Barb. 425.

fective, causing an explosion and an injury to a passenger.[4]

§ 415. SAME—CARRYING EXCESSIVE NUMBER OF PASSENGERS.

As already stated, section 4465 prohibits owners of steam vessels from carrying passengers in excess of the number fixed by the certificate of inspection, and it imposes a penalty of $10 for every passenger carried in excess of the number so fixed. This statute applies, not only to vessels engaged in interstate and foreign commerce, but also to a steamboat engaged in carrying passengers on the navigable waters of the United States between ports of the same state only.[1] But it has no application to a ferryboat, though temporarily employed as an excursion boat.[2] But a vessel which obtains a certificate of inspection as a general passenger boat cannot urge that it is a ferryboat when prosecuted for carrying an excessive number of passengers, nor that it was actually engaged in a ferry service when carrying the illegal number of passengers.[3]

However, the penalty for carrying an unlawful number of passengers is not incurred where the excessive number are intruders, against the will of the officers of the boat, who cause it to be moved from its landing to another convenient place to avoid the crowd.[4]

[4] Swarthout v. Steamboat Co., 48 N. Y. 209, affirming 46 Barb. 222.

§ 415. [1] The City of Salem, 38 Fed. 762, 37 Fed. 846; U. S. v. The Frank Sylvia, 37 Fed. 155; The Hazel Kirke, 25 Fed. 601.

[2] Schwerin v. Railroad Co., 36 Fed. 710.

[3] The Hazel Kirke, 25 Fed. 601.

[4] The Geneva, 26 Fed. 647.

In a suit for the penalty, the United States is not a necessary party, nor need the libelant be a passenger on the steamer.[5] The fact that actions of debt have been prosecuted against the master and owners for the penalties imposed by section 4465 does not bar a proceeding in admiralty to subject the vessel to the lien under section 4469, the two remedies being cumulative.[6] The lien on the vessel is not devested by its subsequent sale to a bona fide purchaser for value, without notice of the penalties incurred. A lien for a marine tort is not devested by a sale to a bona fide purchaser. It travels with the thing, wherever it goes, and into whosesoever hands it may pass.[7] In such a proceeding it is not necessary that the vessel be seized or attached before the libel is filed.[8]

§ 416. SAME—CARRYING EXPLOSIVES.

Section 4472 forbids the transportation, on passenger vessels, of camphene, nitroglycerine, benzine, etc., "or other like explosive burning fluids or like dangerous articles." Hydrogen or illuminating gas carried in steel cylinders, though liable to explode by reason of its tendency to expand when heated, has been held not within the statute, since the danger lies, not within the

[5] Pollock v. The Sea Bird, 3 Fed. 573; Hatch v. The Boston, 3 Fed. 807.

[6] Hatch v. The Boston (D. C. Pa.) 3 Fed. 807.

[7] The Avon, 1 Brown, Adm. 170, 178, Fed. Cas. No. 680; The Rock Island Bridge, 6 Wall. 213, 215; Cutler v. Rae, 7 How. 729.

[8] Hatch v. The Boston, 3 Fed. 807.

gas itself, but in the weakness of the vessels containing it.[1]

§ 417. STATUTORY LIMITATION OF VESSEL OWNERS' LIABILITY.

By various acts of congress, the first of which was enacted in 1851 and the last in 1886, the liability of vessel owners for losses or injuries, occurring without their privity or knowledge, is limited to the value of the vessel and the freight then pending. "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." [1] By act of June 26, 1884,[2] it is provided "that the individual liability of a ship owner shall be limited to the proportion

§ 416. [1] Egan v. Steamboat Co., 86 Hun, 542, 33 N. Y. Supp. 791; Russell v. Steamboat Co., 10 Misc. Rep. 593, 32 N. Y. Supp. 824.

§ 417. [1] Rev. St. U. S. § 4283. Sections 4284 and 4285 provide that, if the value of the vessel is not sufficient to compensate injured persons, such persons shall be paid pro rata out of the proceeds of the vessel, and prescribe the method by which this limited liability may be enforced. Section 4289 provides that this limited liability shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

[2] 23 Stat. 57, § 18.

of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending." Act June 19, 1886,[3] amends section 4289 of the Revised Statutes, so as to make the provisions of Act June 26, 1884, relating to the limited liability of vessel owners, applicable to all seagoing vessels, and also to all vessels used in lakes or rivers, or in inland navigation, including canal boats, barges, and lighters.

The ground of the law of the limited liability of shipowners has been recently stated by the supreme court of the United States:[4] "That ground is that, for the encouragement of shipbuilding and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew, done without their privity or knowledge. It extends to liability for every kind of loss, damage, and injury. This is the language of the maritime law, and it is the language of our statute, which virtually adopts that law."

§ 418. SAME—TO WHAT CLAIMS STATUTE EXTENDS.

These statutes limiting the vessel owner's liability apply to claims not only for loss of goods on board, but

[3] 24 Stat. 79, § 4.

[4] Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612.

also for personal injuries to or death of passengers or others on board.[1] "The carriage of passengers in connection with merchandise is so common on the great highways between the old and new continents at the present day that a law of limited liability which would protect shipowners in regard to injuries to goods, and not in regard to injuries to passengers, would be of very little service in cases which would call for its application. * * * We think the law of limited liability applies to cases of personal injuries and death as well as to cases of loss of or injury to property." [2]

Difficult questions sometimes arise in construing the limited liability acts in connection with other statutes touching the liability of vessel owners. For instance, section 4493 of the Revised Statutes[3] declares that the master and owner of any vessel, or either of them, and the vessel, shall be liable to any passenger injured by explosion, fire, collision, or other cause, if it happens through neglect to comply with the law relating to the inspection of steam vessels, or through any known defects or imperfections of the steering apparatus or of the hull. Since the enactment of the statute of 1884, it has been held that this statute does not affect the owner's liability, under the limited liability act, for a disaster which happens without his privity or knowl-

§ 418. [1] Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612; The Amsterdam, 23 Fed. 112; The Epsilon, 6 Ben. 381, Fed. Cas. No. 4,506; In re Long Island North Shore Passenger & Freight Transp. Co., 5 Fed. 599, 624.

[2] Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612.

[3] Act Aug. 30, 1852, § 30 (10 Stat. 72).

edge.[4] The words, "without the privity or knowledge of the owner," in the limited liability act, have also been the source of some difficulty.[5] It has been held that, where the unseaworthy condition of an excursion barge would appear by a proper examination, her

[4] Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612; In re The Annie Faxon, 66 Fed. 575. The object of the last act is to fix the liability of shipowners among themselves, and extend their right to limit their liability to all cases of debt and liability under contract obligations made on account of the ship. But it is as much the duty of a steamboat owner to cause an inspection of a boiler which has been repaired in a substantial part as to cause an inspection of a new boiler; and a failure to cause such inspection will preclude the steamboat owner from limiting his liability to a passenger injured in consequence of the explosion of the boiler, since section 4493 provides that for failure to make the statutory inspection there should be, as to passengers, liability for the full amount of the damages. The Annie Faxon, 21 C. C. A. 366, 75 Fed. 312. But see Sherlock v. Alling, 93 U. S. 99; Chisholm v. Transportation Co., 61 Barb. 363.

[5] In Lord v. Steamship Co., 4 Sawy. 292, Fed. Cas. No. 8,506, it is said on this subject: "As used in the statute, the meaning of the words 'privity or knowledge' evidently is a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to loss, without adopting appropriate means to prevent it. There must be some personal concurrence or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provision. * * * It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew, and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars,—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity, within the meaning of the act. But the owner, under this act, is not an insurer.

owners are chargeable with knowledge thereof, and any injury to passengers resulting therefrom is "with the privity and knowledge of the owners," and that, therefore, they cannot limit their liability under the statute.[6] But a vessel owner will not be charged with privity or knowledge of the defective condition of her boiler, where the defect is not patent, and the owner has employed a competent person to make the inspection of the boiler, who has reported that the condition was good.[7]

§ 419. SAME—TO WHAT WATERS AND VESSELS APPLICABLE.

"The law of limited liability of shipowners is a part of our maritime code, and the extent of its territorial operation is necessarily co-extensive with the general admiralty and maritime jurisdiction; and that, by the settled law of this country, extends wherever public navigation extends,—on the sea and the great inland

If he exercises due care in the selection of a master and crew, and a loss afterwards occurs from their negligence, without any knowledge or other act or concurrence on his part, he is exonerated by the statute from any liability beyond the value of his interest in the ship and the freight then pending. So, also, if the owner has exercised proper care in making his ship seaworthy, and yet some secret defect exists which could not be discovered by the exercise of such care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated, for it cannot be 'with his privity or knowledge,' within the meaning of the act, or in any just sense."

[6] In re Myers Excursion & Navigation Co., 57 Fed. 240.

[7] The Annie Faxon, 21 C. C. A. 366, 75 Fed. 313, affirming 66 Fed. 575.

lakes, and the navigable waters connecting therewith. Hence, the fact that a disaster to a steamboat takes place within the territorial limits of a state will not prevent the application of the limited liability law." [1]

A barge without motive power, which is used for transporting excursion parties in New York Harbor and adjacent waters, is within the limited liability act. Such a barge, without motive power, may be surrendered by her owners, without the surrender of the tug which towed it at the time of the loss, though the tug belongs to the same owner.[2] The act likewise extends to vessels not registered, and the owners of which are engaged in transportation by land as well as by water.[3]

§ 420. SAME—ASCERTAINING VALUE OF VESSEL.

The point of time at which the amount or value of the owner's interest in ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss or damage occurs. If the ship is lost at sea, or the voyage be otherwise broken up before arriving at her port of destination, the voyage is then terminated for the purpose of fixing the owner's liability. Where the voyage is terminated by the sinking of the ship, her value at that time is the limit of

§ 419. [1] Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612. Before the amendment of 1886 it was held that the statute did not apply to boats navigating streams connecting the Great Lakes. Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32.

[2] In re Myers Excursion & Navigation Co., 57 Fed. 240.

[3] Wallace v. Steamship Co., 14 Fed. 56.

the owner's liability; and the subsequent raising of the wreck, and repair of the ship, giving her an increased value, has nothing to do with the liability of the owner, and does not enter into the amount for which the owner is liable.[1]

Insurance money received by the owner on the loss of the ship is no part of the owner's interest in the ship or freight, within the meaning of the law, and does not enter into the amount for which the owner is liable.[2]

§ 420. [1] The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150; The Great Western, 118 U. S. 520, 6 Sup. Ct. 1172.

[2] Id. It may be a question whether or not the limitation of the vessel owner's liability has not been unduly extended by these statutes and decisions. Vessels nowadays are owned by corporations, and, even without any limitation of liability, only the corporate property can be subjected to demands for loss or injury caused by the negligence or other wrongs of the master and crew. Under these statutes and decisions, it would seem that a carrier by water may, by insuring his vessels, save himself from all loss for the torts of the master and crew, and throw on passengers and shippers the entire risk. At any rate, it is interesting to compare the views of the United States supreme court in cases touching the power of carriers by land to limit their common-law liability with the cases touching the limited liability of carriers by water.

CHAPTER XXX.

REMEDIES AND FORMS OF ACTION.

§ 421. Action for Damages and Writ of Mandamus.
422. Form of Action.
423. Same—Personal Injuries Negligently Inflicted.
424. Same—Failure to Receive Passenger, or to Carry to Destination.
425. Same—Ejection of and Assaults on Passengers.

§ 421. ACTION FOR DAMAGES AND WRIT OF MANDAMUS.

The passenger's remedy for breach of the carrier's duties is, generally speaking, an action for damages, though the carrier's duty to accept and transport the passenger may also be enforced by mandamus.

With but one exception, all the cases in the books between carrier and passenger are in form actions for damages. In this exceptional case, it was held that one to whom a railroad company unlawfully refuses to sell commutation tickets is not obliged to resort to an action for damages, but he is entitled to compel the sale of such a ticket to him by the writ of mandamus.[1]

§ 421. [1] Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803.

§ 422 FORM OF ACTION.

A passenger, suing a carrier for damages, may elect whether he will sue in contract or in tort; and, where the nature of the action is in doubt on the pleadings, courts are inclined to construe it as in tort, for the benefit of the passenger.

The law pertaining to the remedies for breach of the carrier's duty to the passenger occupies debatable territory, where the law of contract and of tort overlap each other. By the sale of a ticket to a passenger, a contract is entered into with the carrier for his transportation to the place of destination named in the ticket. Now, if the carrier does not transport him to his destination, or if it does not transport him with reasonable diligence, or if it does not transport him safely, it may be urged that the carrier has broken its contract, and that, therefore, the passenger must bring an action for breach of contract. On the other hand, it may be argued that, since the common law, irrespective of any contract, imposes on the carrier the duty of transporting the passenger to his destination, without unreasonable delay, and of providing for his safety so far as human skill and foresight can do so, the passenger's remedy for the breach of the carrier's duty is an action in tort. Under the common-law system of pleading, the form of the action was of capital importance; and even to-day, in states where all distinctions between forms of action have been abolished by statute, the question whether an action is founded on

contract or sounds in tort is important on the subject of proximate cause and damages,[1] of parties,[2] of the statute of limitations,[3] and, in some states, of costs.

The rule adopted by the courts is that plaintiff at his option may sue either on contract or in tort. "The plaintiff has his choice of remedies, either to bring assumpsit or case; and, when one or the other form of action is adopted, it must be governed by its own rules." [4] "Where the duty for whose breach the action is brought would not be implied by law by reason of the relation of the parties, whether such relation arose out of contract or not, and its existence depends solely on the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort; when otherwise, case is an appropriate remedy. Of course, assumpsit is a concurrent remedy with case, in all cases where there is an express or implied contract. Thus, if one contract to deliver to another a load of wood, or

§ 422. [1] See ante, § 119.

[2] See post, § 426.

[3] Where a person makes a contract for his transportation with a common carrier, he has two remedies,—one an action for breach of the contract, the other an action on the case for the wrong,—and he may elect which remedy he will pursue. If he elects to bring an action for breach of the contract, he has, under the Code, four years within which to bring it; if he elects to sue upon the tort, he has two years. If he sues upon the breach of contract, and there is a final adjudication of this suit upon the merits, he cannot afterwards sue the same defendant in tort. Patterson v. Railroad Co., 94 Ga. 140, 21 S. E. 283. But see post, § 510.

[4] McCall v. Forsyth, 4 Watts & S. (Pa.) 179; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158. A breach of contract made by a common carrier with one of the passengers is a breach of its public duty for which it is liable in tort. Caldwell v. Railroad Co., 89 Ga. 550, 15 S. E. 678.

pay a specific sum of money on a given day, and fails to do so, an action on contract alone will lie. But take this case: B. lets his horse to A., to be kept at a stipulated price per day, and returned on demand. By the mere delivery of the horse, to be kept at the price agreed upon, the law implied or imposed the duty of returning him upon demand, without any agreement to that effect; and the duty being thus implied by law, independently of the express stipulation for its performance, case clearly would lie for its breach." [5] "If the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort." [6]

[5] Nevin v. Car Co., 106 Ill. 222, 236. In this case it was held that a sleeping car company is a common carrier, bound by law, independent of any express contract, to carry passengers without discrimination; that where there are sleeping berths not engaged, it is the duty of the company, upon the payment or tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons; and that the fact that there is a special contract between such an applicant and the company, upon which an action of assumpsit might have been maintained for its refusal to furnish a berth, does not at all affect the right to recover in case, which is founded in breach of the company's common-law liability.

[6] Kelly v. Railway Co. [1895] 1 Q. B. 944.

In states where the code system of procedure prevails, the rule as to the construction of pleadings was recently stated as follows by the court of appeals of Colorado:[7] "Under our system of pleading, we have but one form of action; and when the pleader has stated the facts out of which his cause of action arises, and supports that cause by proper proof, he may recover for the tort, even though he has stated facts which at common law would, of necessity, make his action one in assumpsit, and not in case. In other words, we are not willing to admit the existence of those technical distinctions which at the common law determined what action was brought and what relief the plaintiff might have. Undoubtedly, the pleader might so frame his complaint as to disentitle himself to any other judgment than for the breach of a contract, with such damages as the breach proved might warrant. Even though, in this case, the plaintiff had alleged the payment of his fare, and a promise by the company to carry him, yet, when he proceeded to state the tort, and claim the damages therefor, he cannot, because he has alleged both a promise and a consideration, be limited to a recovery as for breach of contract."

§ 423. SAME—PERSONAL INJURIES NEGLIGENTLY INFLICTED.

A passenger injured during transportation by the negligence of the carrier may sue either in contract or

[7] Denver Tramway Co. v. Cloud, 6 Colo. App. 445, 40 Pac. 779.

in tort.[1] A passenger injured during transportation may, without doubt, declare for a breach of contract; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier or the agents of the company; and in such action plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract.[2]

An action against two railroad companies for personal injuries to a passenger from their negligence, causing derailment of a train, is an action ex delicto, notwithstanding an allegation in the complaint that plaintiff held a ticket for transportation on one of them; and the right to recover against one is not affected by the fact that plaintiff fails to sustain the action against the other.[3]

§ 424. SAME — FAILURE TO RECEIVE PASSENGER, OR TO CARRY TO DESTINATION.

For failure to stop its train at one of its regular stations, a person who has purchased a ticket good for

§ 423. [1] Pennsylvania R. Co. v. Peoples, 31 Ohio St. 537; Smith v. Seward, 3 Pa. St. 342; Sheldon v. The Uncle Sam, 18 Cal. 527.

[2] Baltimore City P. Ry. Co. v. Kemp, 61 Md. 619.

[3] Atlantic & P. R. Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. This case was affirmed by the supreme court of the United States, which held that a complaint which alleges that defendants, as common carriers, jointly owned and operated a described line of railroad; that plaintiff was a passenger on a train of cars so operated by defendants, which train was derailed and thrown from the tracks; and that plaintiff is injured,—states a cause of action in tort, and not on contract. Atlantic & P. Ry. Co. v. Laird, 17 Sup. Ct. 120.

that train may sue either for breach of contract or in tort for defendant's breach of its public duty; and in such a case the action will be deemed founded in tort, unless it plainly appears that the breach of contract is the gravamen of the complaint.[1] "The character of the action must be determined from the nature of the grievance complained of, rather than by the form of the declaration." [2] A complaint which alleges a contract to carry a person from one station to another, its willful breach by the company in carrying him past his destination, and the insult and injury accompanying such act, damnifying plaintiff in the sum of $2,500, is an action sounding in tort, and not on contract.[3] So a complaint which alleges that plaintiffs purchased tickets from a railroad company, and took passage on its cars; that defendant "wholly disregarded its contract and obligations" with plaintiffs by setting them down in the nighttime about three miles from destination; and that plaintiffs were compelled to walk that distance; and which seeks to recover for sickness and suffering caused by such walk,—will be treated as an action in tort, and not on contract.[4] But a complaint which alleges that defendant agreed to carry plaintiff and others on a round-trip excursion on a Sun-

§ 424. [1] Purcell v. Railroad Co., 108 N. C. 414, 12 S. E. 954, 956; Heirn v. McCaughan, 32 Miss. 17.

[2] Heirn v. McCaughan, 32 Miss. 17.

[3] Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967.

[4] Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911. Where, on the trial, a carrier has treated an action for refusing to carry a passenger as one of tort, and not on contract, it cannot insist that the verdict is excessive, on the theory that the action is one for breach of contract. Lake Erie & W. R. Co. v. Acres, 108 Ind. 548, 9 N. E. 458.

day; that defendant failed to carry them back at the appointed time, but willfully and fraudulently compelled them to wait until the following morning, whereby plaintiff was greatly injured in bodily health, suffered great pain and anxiety of mind, and lost much time from business,—is an action on contract, and not for tort, since no common-law duty rested on defendant to carry passengers on Sunday.[5]

A petition which alleges that a railroad company, in disregard of its duty as a common carrier, and in violation of its agreement in selling plaintiff a ticket, expelled him from the cars on refusal to pay an additional and illegal charge, states a cause of action in tort, and not for breach of contract.[6]

§ 425. SAME—EJECTION OF AND ASSAULTS ON PASSENGERS.

For the wrongful ejection of a passenger during the journey, he may sue either in assumpsit for breach of the contract to carry, or in trespass or trespass on the case for breach of the carrier's common-law duty.[1]

[5] Walsh v. Railway Co., 42 Wis. 23. The court said: "It is manifest that the action is not sustainable for a breach of duty as carrier, because defendant was under no obligation to carry plaintiff or any other person on its road on that day. It does not run passenger trains on Sunday for the accommodation of the public, nor does it hold itself out to the world as ready to engage in the transportation of passengers on that day. * * * Hence the plaintiff felt the necessity of counting upon an express contract of carriage in both counts, and of proving such contract, in order to maintain the action."

[6] Atchison, T. & S. F. R. Co. v. Long (Kan. App.) 47 Pac. 993.

§ 425. [1] Emigh v. Railroad Co., 4 Biss. 114, Fed. Cas. No. 4,449. A passenger who has been ejected from a train may waive the tort,

"It is long and well settled, where common-law pleadings prevail, that the breach of the carrier's duty may be treated as a breach of contract, and declared on in assumpsit, or may be treated as a tort, and declared on in case, according as the pleader may see fit; because the liability is founded on the common law as well as upon contract, or, rather, because the law imposes on the common carrier an obligation without regard to the contract, creating the implied contract and controlling the special one." [2]. A passenger rightfully on a street car, who, in obedience to an order of the conductor, leaves it, may sue in tort for the ejection, and is not bound to sue in assumpsit for breach of the contract to carry to destination. Her submission to the conductor's order, and the surrender of her seat, were not voluntary acts which waived the tort.[3] So, though it has been held in some jurisdictions that the ticket is conclusive as between passenger and conductor, yet it has been also held that if a wrong ticket has been given him by mistake of the ticket agent, and he is therefore expelled from the train, he is not restricted to assumpsit for breach of contract, but may sue the company in tort for the damages, and recover for the indignity, delay, and discomfort caused by the expulsion.[4]

But, in jurisdictions where the common-law form of

and sue for breach of contract. Union Pac. Ry. Co. v. Shook, 3 Kan. App. 710, 44 Pac. 685.

[2] Boster v. Railway Co., 36 W. Va. 318, 15 S. E. 158.

[3] Consolidated Traction Co. v. Taborn, 58 N. J. Law, 1, 32 Atl. 685.

[4] Poulin v. Railway Co., 47 Fed. 858; Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. See, also, ante, § 317 et seq.

pleading still obtains, it seems that the pleader is not yet out of the woods after he has decided to sue in tort, but that he must choose, at his peril, from among the various common-law actions ex delicto. If a passenger has been ejected with actual violence, the proper form of action is stated to be trespass, but if the ejection has been accomplished without the use of actual force, or if he seeks to recover what are termed "consequential damages," the proper form of action is trespass on the case.[5]

Passing now to the construction of particular pleadings, it has been held that a complaint which alleges that, after plaintiff purchased his ticket, he entered defendant's car, and was ejected therefrom by defendant's servants, and which prays for damages, states an action in tort, and not for breach of contract.[6] An action for damages, actual and exemplary, for carrying a passenger past his destination, and wrongfully putting him off the train, and for injuries sustained

[5] Trespass, and not case, is the proper form of action against a railroad company for the act of its conductor in ejecting, with force, for nonpayment of fare, a passenger, between stations, in violation of law. Had the conductor stopped the train, and ordered appellee to get off, and he, to avoid altercation, had obeyed, then, as no force would have been employed in wrongfully putting him off the train, case would no doubt have been the proper remedy. Chicago & N. W. Ry. Co. v. Peacock, 48 Ill. 253. See, also, St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 353. An action of trespass will not lie for the expulsion of a passenger from a car, where plaintiff seeks to recover, not only direct and immediate damages, but secondary or consequential damages, as for detention at the station and delay in business. The action must be trespass on the case. Barnum v. Railroad Co., 5 W. Va. 10.

[6] Denver Tramway Co. v. Cloud, 6 Colo. App. 445, 40 Pac. 779.

while walking back, is in tort, although the petition alleges the purchase by plaintiff of a ticket from the railway company; and such action is governed by the statute of limitations relating to torts, and not to that relating to contracts.[7] But a paragraph of a complaint which alleges that plaintiff purchased a ticket at one of defendant's stations; that, in consideration

[7] Galveston, H. & S. A. Ry. Co. v. Roemer, 1 Tex. Civ. App. 191, 20 S. W. 843. An action on the case by a passenger against a railroad company for wrongfully expelling him from the train with force and violence, though the declaration alleges a contract for carriage, is not for breach of the contract, but for a tort by breach of duty, and punitive, as well as actual, damages are recoverable. Head v. Railway Co., 79 Ga. 358, 7 S. E. 217. A declaration which alleges that plaintiff entered the caboose of a freight car to become a passenger thereon, and that, while treating with the conductor as to his passage, the conductor cursed, abused, and assaulted him, is not for breach of contract in not carrying plaintiff as a passenger, but is an action of trespass on the case, and plaintiff has the right to amend by describing the tort more particularly. Turner v. Railroad, 69 Ga. 827. A declaration for the ejection of a passenger, which alleges defendant's duty to carry and its breach, and to which defendant pleads not guilty, is an action in tort rather than on contract, and a nonsuit should not be granted on the ground that no actual damages were shown. City & S. Ry. v. Brauss, 70 Ga. 368. A complaint which alleges that defendant, a steamboat owner, so negligently and improperly conducted himself as a common carrier that he did not transport plaintiff, a passenger, with reasonable comfort and safety, and did not exercise the utmost care in selecting proper agents and servants in the business of running the boat, and permitted plaintiff to be assaulted and beaten by his agents and servants thereon, is based on the negligent discharge by plaintiff of his duties as a common carrier, and is not an action for assault and battery; and hence, plaintiff having recovered less than $50, defendant is entitled to costs, under Rev. St. Wis. § 2918, subd. 5, and section 2920, awarding costs to defendant when the recovery is less than $50, except in actions for assault and battery. Mace v. Reed, 89 Wis. 440, 62 N. W. 186.

thereof, defendant "contracted and agreed" to furnish her a suitable and customary place for her to await the arrival of a train; and that defendant refused to light the lamps in said waiting room when requested so to do by plaintiff, and accompanied said refusal with insulting language,—states a cause of action on contract; and, where other causes of action in tort not arising out of the same transaction are united therewith, the complaint is demurrable for misjoinder of causes of action.[8] So a petition which alleges that defendant is a common carrier; that it made a certain contract of carriage with the plaintiff, receiving its pay therefor; that plaintiff entered upon the cars in pursuance of such contract; and that defendant, in violation of its contract, did not stop at the place to which it had agreed to carry him, but carried him some distance beyond, and then, by a sudden starting of the train, while attempting to alight in obedience to orders, threw him down and injured him,—states a cause of action arising ex contractu, and not ex delicto, and the statute of limitations governing actions on contract applies.[9] A complaint which alleges that plaintiff was a passenger on a sleeping car on defendant's railroad during the nighttime; that the porter did not

[8] Bishop v. Railway Co., 67 Wis. 610, 31 N. W. 219.

[9] Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145. A declaration which alleges that plaintiff purchased a round-trip ticket, and voluntarily left the car on the return trip when informed by the conductor that he could not carry her on that ticket, and that plaintiff thereafter took the next train, and was carried back on that ticket without extra charge, is for a breach of contract, and no recovery can be had beyond the actual damages sustained. Goins v. Railroad, 68 Ga. 190.

call or awaken her before reaching destination; and that he compelled her to leave the sleeping car, without giving her time to dress, hustling and pushing her from the car, producing injuries,—states a cause of action in tort, and not on contract, though it is also alleged that there was implied in the contract of carriage that defendant should awaken plaintiff a sufficient length of time before reaching destination to enable her to dress.[10]

[10] McKeon v. Railway Co. (Wis.) 69 N. W. 175.

CHAPTER XXXI.

PARTIES.

§ 426. Distinction between Actions on Contract and in Tort.
427. Plaintiffs.
428. Defendants.

§ 426. DISTINCTION BETWEEN ACTIONS ON CONTRACT AND IN TORT.

The distinction between the forms of action ex contractu and ex delicto may be a matter of some importance in determining who are the proper parties. No one can sue or be sued for breach of contract who is a stranger to the contract, or, as it is sometimes expressed, is not privy to the contract.[1] In actions on contract, all the persons with whom the contract is made must join as plaintiffs, but in an action of tort it is frequently a matter of choice whether the persons injured by the same wrong should sue jointly or separately.[2] Indeed, as to personal injuries, there can be no question that each injured person must sue separately. Again, joint contractors are jointly liable as defendants for breach of contract, while a wrongdoer is responsible for his torts separately as well as jointly with his joint wrongdoers.[3]

Actions for personal injuries to passengers are, however, almost without exception, brought in form as sounding in tort; and hence the rules pertaining to that class of actions will alone be stated.

§ 426. [1] Dicey, Parties, 10. [2] Dicey, Parties, 11. [3] Id.

§ 427. PLAINTIFFS.

In actions of tort, the general rule is that the person injured is the person to bring the action for the injury against the wrongdoer; and no person other than the one injured can sue.[1]

This rule is a self-evident proposition of law, to which there are no real exceptions.[2] At common law, however, the rule was that husband and wife must sue jointly for injuries to the person, character, or property of the wife, committed either before or after marriage. Under the married women's statutes, however, the general rule now is that she may sue alone for personal injuries,[3] and in some of the states that she must sue alone.[4] The husband, however, has a right to sue alone for loss of services and society which he has sustained, and the expenses of cure which he has incurred, by reason of his wife's injuries. The fact that a contract to carry was made with the wife alone

§ 427. [1] Dicey, Parties, 325, 330.

[2] An attorney who, by agreement with his client, is to receive a portion of whatever amount shall be recovered, is not a necessary party plaintiff, and need not be joined as such. McDonald v. Railroad Co., 26 Iowa, 124.

[3] Omaha H. Ry. Co. v. Doolittle, 7 Neb. 481.

[4] Chicago, B. & Q. R. Co. v. Dickson, 67 Ill. 122; Barker v. Railway Co., 92 Ala. 314, 8 South. 466; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440. In Texas, where the community system prevails, it has been held that a married woman who has, without her fault, been permanently abandoned by her husband, and left without means, may maintain an action for tort without his joinder. St. Louis S. W. Ry. Co. v. Griffith (Tex. Civ. App.) 35 S. W. 741.

does not preclude the husband from maintaining such an action.[5]

A father has a right to maintain a similar action for the loss of a child's services.[6] In case of the father's death, it would seem on principle that the widowed mother should succeed to his rights. In Pennsylvania, it has been held, however, that a widowed mother cannot maintain an action for loss of services against a railroad company, based on the implied contract to carry her minor son safely as a passenger. She was not a party to the contract, and had no common-law right to the son's services, and there was no special

[5] Blair v. Railroad Co., 89 Mo. 334, 1 S. W. 367. The court said: "The gravamen of such an action by the husband being a breach of duty by the common carrier, privity of contract is not essential. Any one sustaining damage by reason of such breach of duty may maintain his action therefor. In such case, the tort does not spring from nor arise out of a breach of contract, but the action lies against the carrier 'on the custom of the realm.' The action is bottomed on a violation of public duty,—a duty which the law imposes independent of contract." Since the statute of Kansas gives a married woman the fruits of her labor, a petition in an action by a husband for injuries to the wife must allege, not only the marital relation, but also such other facts as indicate that at the time of the injury the relations of plaintiff and his wife were such as to entitle him to her services. Atchison, T. & S. F. R. Co. v. Dickey, 1 Kan. App. 770, 41 Pac. 1070.

[6] This action is founded, not on the parental relation, but on the fact that the father is entitled to the services of his minor children. The father, suing for injuries to his son, must therefore allege and prove that the son was his servant. Dunn v. Railway Co., 21 Mo. App. 188; Buck v. Power Co., 46 Mo. App. 555. The fact that a minor, by its parent as next friend, has recovered damages against a street railroad for a personal injury, does not bar a suit by the parent for loss of services of the child occasioned by the same injury. Wilton v. Railroad Co., 125 Mass. 130.

contract between them which constituted her his mistress.[7]

A master may likewise maintain an action for the loss of services which he may sustain by reason of a servant's injuries. In an English case, however, it was held that the master had no right to sue for loss of services where the servant was injured while a passenger on defendant's railroad, because the action arose on contract, to which the master was not a party or a privy.[8] This case has been doubted by eminent British authority,[9] and the supreme judicial court of Massachusetts has distinctly held that a master may maintain an action against a common carrier for loss of services of his apprentice, who was injured while a passenger on defendant's cars, though the contract of carriage was made with the apprentice personally, and not with the master. "The tort alleged does not consist in the breach of any contract. Even if the contract arising from the purchase of a ticket were held to have been made with the apprentice alone and in his own right, it would not exclude liability in tort for injuries caused by the negligence of defendant, and

[7] Fairmount & A. St. P. Ry. Co. v. Stutler, 54 Pa. St. 375. Under Code Ga. 1882, § 1793, which provides that the parental power of a father is lost by his failure to provide necessaries for his minor child, or by his abandonment of the family, the mother becomes entitled to the custody and the earnings of minor children in such a case; and she may sue to recover the value of the services of a child injured by the negligence of another. Savannah, F. & W. Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157.

[8] Alton v. Railway Co., 19 C. B. (N. S.) 213, 11 Jur. (N. S.) 672.

[9] Pol. Torts, 663.

upon that liability an action may be maintained by any one who has suffered damage by means thereof." [10]

§ 428. DEFENDANTS.

Any person who causes injury to another is liable to be sued by the person injured; and one, or any, or all, of several joint wrongdoers may be sued.[1]

Every person who is the cause of an injury to another's person, reputation, or property is liable to an action, and no one is liable to be sued for any wrong of which he is not the cause. In determining, therefore, whether a given person is liable to be sued for a wrong, of whatever description, the point to be considered is whether he be or not, in the eye of the law, the cause of the injury complained of, to the person, reputation, or property of the plaintiff.[2]

Where a corporation inflicts an injury, the corporation itself must be sued. A stockholder is not liable for the negligence of the officers, agents, or employés of the company; and the fact that the majority of the stock of one railroad is owned by another does not change the rule, so as to make such other liable.[3]

One or any or all of the members of a partnership may be sued for a wrong committed by the firm or partnership; and this rule applies to an action for in-

[10] Ames v. Railway Co., 117 Mass. 541.

§ 428. [1] Dicey, Parties, 409, 413.

[2] Dicey, Parties, 413.

[3] Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 23 Pac. 151.

juries caused by the negligence of an employé of the partnership.[4]

With respect to joint wrongdoers, the rule is that every person who joins in committing a tort is separately liable for it, and cannot escape liability by showing that another person is liable also, nor can one of several wrongdoers compel plaintiff to sue him together with the persons with whom he has joined in committing the wrong.[5] This rule is frequently applied in cases where a passenger has been injured in a collision caused by the concurring negligence of two trains or vessels owned by different companies. A passenger in one vessel injured in a collision with another has a right of action against them jointly or severally, at his election, and, if he brings a joint action, it is for the jury to fix the liability where it belongs.[6] So a passenger on a street car, who is injured in a collision between a locomotive and the car, may maintain a joint action against both companies, if the collision was produced by the neglect of the railroad company to give notice of the approach of the locomotive, concurring with the neglect of the street-car company to observe proper care in crossing the railroad track. Although such duties are diverse, and the

[4] Roberts v. Johnson, 58 N. Y. 613; Bretherton v. Wood, 3 Brod. & B. 54. The carrier's liability for injury to a passenger is founded on a breach of common-law duty, rather than of contract; and hence plaintiff need not prove an allegation in his declaration that defendants were joint owners of a stage line, since he may sue them severally. Frink v. Potter, 17 Ill. 406.

[5] Dicey, Parties, 430.

[6] Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32.

neglect to perform each is separate and distinct, yet, as the wrongdoing of one company unites with that of the other in causing the injury, the tort is joint, and one or both tort feasors may be sued. If the jury negative the negligence charged against one of such tort feasors, a verdict against the other is not objectionable.[7]

[7] Matthews v. Railroad Co., 56 N. J. Law, 34, 27 Atl. 919. In an action against two alleged joint tort feasors to recover for injuries charged in the complaint to have resulted from their joint negligence, in which each of the defendants answers separately, denying the negligence imputed to it, a verdict finding against one of the defendants, but silent as to the other, is not responsive to the issue raised by the answer of the latter, and will be set aside at the instance of plaintiff; and the failure of plaintiff to ask for a correction of the verdict at the time it was announced does not raise a presumption that it was abandoned at the trial. Rankin v. Railroad Co., 73 Cal. 93, 15 Pac. 57.

CHAPTER XXXII.

PLEADING.

§ 429. Statement of Plaintiff's Cause of Action—In Action Based on Negligence.
430. Same—Alleging Duty of Care—Relation of Carrier and Passenger.
431. Same—Alleging Negligence.
432. Same—Alleging Contributory Negligence.
433. Same—Actions for Ejection or Failure to Carry to Destination.
434. Same—Alleging Damages.
435. Same—Joinder of Causes of Action.
436. Defensive Pleadings.
437. Amendments.
438. Pleading and Proof—Variance.
439. Same—Allegations as to Place.
440. Same—Allegations of Negligence.
441. Same—Allegations of Gross Negligence and Willfulness.
442. Same—Allegations by Plaintiff Negativing Contributory Negligence.
443. Same—In Actions for Ejection and Failure to Carry to Destination.
444. Same—Allegations as to Damages and Injuries.
445. Same—Defendant's Pleadings.
446. Same—Waiver of Objections.

§ 429. STATEMENT OF PLAINTIFF'S CAUSE OF ACTION—IN ACTION BASED ON NEGLIGENCE.

In actions for injuries caused by negligence, plaintiff's first pleading, whether it is termed a declaration, a complaint, or a petition, must state facts showing:

(1) The existence of a duty on the part of defendant to observe care towards plaintiff.

(2) A breach of that duty.

(3) Damages resulting to plaintiff, as a proximate consequence, from the breach of the duty alleged.[1]

The common-law system of pleading has been abolished, not only in many states of the American Union, but also in England, where it originated, was developed, and flourished so vigorously for many centuries. But, under all systems of pleading, whether at common law or under the Code, the fundamental requisites in actions based on negligence are those stated in the black-letter text.

§ 430. SAME — ALLEGING DUTY OF CARE — RELATION OF CARRIER AND PASSENGER.

Plaintiff must allege the facts which make it defendant's duty to exercise care for his safety. A mere allegation that defendant owed to plaintiff the duty of exercising care is bad as a conclusion of law, unless the facts are alleged. "The allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced; for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. If the particular facts stated in the declaration do not raise the duty, it can-

§ 429. [1] Ward v. Railway Co., 61 Ill. App. 530; Black, Acc. Cas. 201.

not be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated." [1]

Where the pleader alleges the existence of the relation of carrier and passenger, he need not specially allege the duties which the carrier is bound to perform. These duties are annexed by law to the contract to carry, and the courts will take judicial notice of them, without any averment as to what they are.[2] It has even been held unnecessary to allege in the complaint that a railroad company is a common carrier, since the courts will take judicial notice of this fact.[3] So, where the complaint alleges that plaintiff was a passenger on defendant's railroad when injured by its negligence, it is unnecessary to allege that defendant was a common carrier, or that it owed a duty to plaintiff.[4]

But the facts alleged must show that plaintiff was a passenger when injured. An allegation that plaintiff was on a street car when injured, and that it was

§ 430. [1] 2 Add. Torts, § 1338. See, also, West Chicago St. R. Co. v. Coit, 50 Ill. App. 640.

[2] Evansville & C. R. Co. v. Duncan, 28 Ind. 441.

[3] Boyle v. Railway Co., 13 Wash. 383, 43 Pac. 344.

[4] Atlantic & P. R. Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. An allegation that defendants were the owners of a certain railroad, and "were the owners and proprietors of and were propelling a certain train of passenger cars upon said road, for a certain reasonable reward paid to defendants," is a sufficient allegation that defendants were common carriers, without alleging it in direct terms. Fuller v. Railroad Co., 21 Conn. 557. The fact that a railroad company is a corporation should, of course, be alleged, if that is the fact. In Texas it has been held that, if the provision of the statute on the subject does not positively require such allegation, it contemplates such mode of procedure. Galveston, H. & S. A. Ry. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

defendant's duty to safely carry him, and to guard, protect, and secure him while leaving the car, is bad, since no facts giving rise to the duty are alleged, and plaintiff may have been on the car as a trespasser.[5] So a complaint which alleges that plaintiff went on board a freight train by the invitation and permission of the conductor does not show that plaintiff was a passenger on the train.[6] But a complaint which alleges that at a certain date plaintiff took passage and was admitted as a passenger on one of defendant's trains, to be carried from one station to another on its road, sufficiently alleges that plaintiff was a passenger, without stating how and in what manner he was admitted as a passenger, whether he purchased a ticket or was prevented therefrom, or whether he paid or tendered his fare from

[5] Breese v. Railroad Co., 52 N. J. Law, 250, 19 Atl. 204. So it has been held in Alabama that, where the complaint does not show whether plaintiff was a passenger, an employé, or a trespasser, the construction least favorable to the plaintiff will be adopted, and it will be presumed that he was a mere trespasser, who can recover only for injuries caused by reckless, wanton, or intentional negligence. Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458.

[6] Smith v. Railroad Co., 124 Ind. 394, 24 N. E. 753. In such a case the petition is fatally defective, if it is not affirmatively alleged that plaintiff was rightfully on the freight train. Whitehead v. Railway Co., 22 Mo. App. 60. An averment that plaintiff was in the act of getting on one of defendant's passenger cars "as a passenger, as he had the right to do," is the mere averment of the pleader's conclusion; and, where no facts are stated showing that plaintiff was a passenger, no weight can be accorded to such an allegation in determining the sufficiency of the complaint. North Birmingham Ry. Co. v. Liddicoat, 99 Ala. 545, 13 South. 18. But this decision was made under the rule that the averments in a pleading must be taken most strongly against the pleader.

the point of embarkation to that of his destination.[7] So, the failure to allege in distinct terms that the injury was inflicted between the point of departure and that of destination is immaterial, if it distinctly appears that plaintiff was injured while being carried as a passenger.[8]

§ 431. SAME—ALLEGING NEGLIGENCE.

Under the code system of pleading, as well as at common law, it is sufficient to allege negligence in general terms, specifying, however, the particular act alleged to have been negligently done.[1] This rule applies with special force in actions by passengers against carriers. In the first place, the specific defects or acts causing a railway accident are generally matters more within the knowledge of the defendant than the plaintiff, and hence less particularity on plaintiff's part is

[7] Ohio & M. Ry. Co. v. Cruncher, 132 Ind. 275, 31 N. E. 941.

[8] International & G. N. R. Co. v. Underwood, 67 Tex. 589, 4 S. W. 216.

§ 431. [1] Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Clark v. Railway Co., 28 Minn. 69, 9 N. W. 75; Clark v. Railway Co., 15 Fed. 588; Lavis v. Railroad Co., 54 Ill. App. 636; San Antonio St. Ry. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752. "The true rule to be deduced from the more recent appellate court cases in this state is to the effect that the acts which it is intended to be shown were negligently done should be set out with a reasonable degree of particularity, and, in some appropriate form of expression, alleged to have been negligently done. * * * The petition should advise the defendant of the particular negligence complained of, so that he may know what he is called on to defend against." Jacquin v. Cable Co., 57 Mo. App. 320.

required. In the second place, the happening of certain classes of accidents, resulting in injury to a passenger, raises a presumption of negligence against the carrier.[2] But in all common-law actions, the basis of which is negligence of defendant, negligence or its equivalent must be distinctly averred, or such facts must be stated that a presumption of negligence arises. It must appear from the complaint, either by direct averment or from the statement of such facts as to a certainty raise the presumption, that the injury was the result of defendant's negligence, or that it was purposely committed.[3] Nor is it sufficient to allege in general terms that an injury has been sustained by reason of the negligence of defendant, but the plaintiff must go on and allege the facts constituting such negligence, which, if believed by the jury, would be sufficient to warrant a finding that defendant has been guilty of negligence. The real inquiry is whether the facts stated in the complaint as constituting negligence are such that, if believed by the jury, negligence may be reasonably inferred by the jury; it being exclusively for the jury to say whether negligence ought to be inferred from such facts.[4]

The scope and effect of these general rules will be fully understood by a reference to specific allegations passed on by the courts. An allegation that defendants so "carelessly and negligently provided, fitted out,

[2] Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902. See post, § 480 et seq.

[3] Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Fahr v. Railway Co., 9 Misc. Rep. 7, 29 N. Y. Supp. 1.

[4] Madden v. Railway Co., 35 S. C. 381, 14 S. E. 713.

managed, and constructed their coach that it broke down, and broke plaintiff's leg," is a sufficient allegation of negligence, without stating the particulars in which defendant was negligent or why the coach broke down.[5] A complaint which charges the proprietors of a stagecoach with negligence in failing to provide lights for the coach on a dark night, and in furnishing unreliable horses and an insufficient driver, resulting in the overturning of the coach, is not defective in failing to state how the negligent acts produced the accident.[6] A general allegation in a complaint that a passenger on a railroad train was injured by its derailment caused by the negligence of defendant's servants, or the defective condition of the track, is sufficient, without stating the particulars of the derailment.[7] An allegation that the train started before plaintiff had a rea-

[5] Ware v. Gay, 11 Pick. (Mass.) 106.

[6] Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125.

[7] Carmanty v. Railway Co., 5 La. Ann. 703; Gulf, C. & S. F. Ry. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104; Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280; Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 South. 574; Clark v. Railway Co., 15 Fed. 588; Ohio & M. Ry. Co. v. Selby, 47 Ind. 471. A complaint which alleges that a passenger train was derailed because defendant negligently and carelessly used a defective locomotive, and ran the train at a high rate of speed around a curve not properly elevated, and over defective and insufficient rails not properly spiked to the cross-ties, is sufficient, without stating specifically in what the insufficiency of the locomotive consisted, or in what respect the rails were defective. Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476. An allegation that a car was upset and thrown down by the negligence of defendant, and that a passenger therein was killed, sufficiently alleges negligence, without stating the manner in which the car was upset. Searle v. Railway Co., 32 W. Va. 370, 9 S. E. 248.

sonable time to alight safely is equivalent to an allegation that the train started while passengers were in the act of alighting, and is sufficient.[8] A petition which avers that plaintiff, a passenger, was induced and directed, by the negligence of the conductor, to step off the train before it reached the platform, and that in so doing his injuries were received, is sufficiently certain as to the manner in which the accident occurred.[9] A petition is sufficiently specific which alleges that defendant negligently and unskillfully managed its train so "as to check its speed very suddenly, and to jolt and pitch the same suddenly and with great force backward and forward," so as to throw plaintiff out of the car and onto the platform, and from the platform onto the railroad track.[10]

[8] McCaslin v. Railway Co., 93 Mich. 553, 53 N. W. 724. The petition alleged that, on the train's stopping at plaintiff's destination, "plaintiff immediately proceeded to alight. * * * Said train was crowded, quite a number of people getting off at said point, which unavoidably caused plaintiff to be longer in getting off, by reason of said crowd being in front of him"; and that defendant, disregarding the contract to safely carry plaintiff, without sound of bell or signal, suddenly and recklessly started said train, thereby throwing plaintiff to the ground. Held, on general demurrer, that the petition sufficiently alleged that the train was not stopped a sufficient length of time to allow plaintiff to alight in safety. Houston & T. C. R. Co. v. Hubbard (Tex. Civ. App.) 37 S. W. 25.

[9] Depp v. Railroad Co. (Ky.) 14 S. W. 363.

[10] Condy v. Railway Co., 85 Mo. 79. A declaration which alleges that defendant's servants so negligently and carelessly managed its cars that it was unsafe for plaintiff to remain in one of them, and that he jumped from the car in order to save himself from the danger in which he was placed, is sufficient, without stating the particular acts of negligence which placed plaintiff in peril. Eldridge v. Railroad Co., 1 Sandf. (N. Y.) 89. An indictment for the death of a

But an allegation that a passenger was, "through the negligence, carelessness, and misdirection of defendant, and its agents and servants, thrown from and under the coaches and railcars of defendant," is too general. The field covered by such a general allegation is in reality immense, for it embraces everything involved in the construction of the road and its equipment, or in any wise connected with its method of running. A railroad company must of necessity transact its business by means of innumerable agents, and hence to allege that by some act done or omitted, by some one of such agents, an accident has occurred, is to convey very little practical intelligence. A general charge of carelessness, when used in such a connection, has a very different effect from what it has when applied to the single act of sailing a boat or driving a wagon. There is no very exact criterion on that subject; the only general rule that can be propounded being to the effect that the certainty in the statement of the plaintiff's case must be such that it is intelligible, and that in a reasonable measure it apprises the defendant of the substantial case to be made against him.[11] So, a

passenger on a steamer, who was precipitated into the water by reason of the giving away of the hurricane deck, caused by passengers crowding onto the boat, alleged that defendants were careless and negligent in permitting the boat to be defective and unsafe, and in furnishing it with a dangerous hurricane deck, and in permitting too many passengers "to go, be, and remain on said hurricane deck." Held, that it was not necessary to allege that the defendants failed to take proper measures to restrain or control the crowd at the wharf, since, so long as the crowd confined itself to the wharf, it contributed nothing to the injury. Com. v. Coburn, 132 Mass. 555.

[11] Central R. Co. v. Van Horn, 38 N. J. Law, 133. But in Indian-

mere allegation that defendant negligently failed to discharge its duty to safely transport a passenger is a conclusion of law. The facts which give rise to the duty, and the omission of which creates the negligence of defendant, should be alleged.[12]

Sometimes it is intimated by courts that a different rule would apply on motion to make a pleading more definite and certain than on demurrer. Thus it has been held that a complaint which alleges that the car on which plaintiff was a passenger was, by and through the fault, carelessness, and negligence of the defendant, its agents and employés, thrown from the track, should on motion be made more specific by a statement of the particular acts on which plaintiff predicated his charge of negligence.[13] But, where plaintiff was injured by a sudden increase of speed of a train while he was in the act of stepping off at a station, it is proper to overrule a motion to make the complaint more specific by stating what agent or employé, and what acts of such agent or employé, caused the sudden increase of speed.[14]

apolis & St. L. R. Co. v. Horst, 93 U. S. 291, it was held that an allegation of carelessness and improper conduct of defendant's servants, in connection with the injury, is sufficient. Plaintiff was bound to state his case, but he was not bound to state the evidence by which he intended to prove it.

12 Devino v. Railroad Co., 63 Vt. 98, 20 Atl. 953.

13 Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297.

14 Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31.

§ 432. SAME — ALLEGING CONTRIBUTORY NEGLIGENCE.

As we shall hereafter see, there is conflict of authority as to whether plaintiff or defendant has the burden of proof on the subject of contributory negligence.[1] In those states where the burden of proof is on defendant, plaintiff need not allege, in his complaint or declaration, that he was without fault, but defendant must plead this defense in his answer; while in those states where the burden of proof is on plaintiff his pleading must show that he was not guilty of want of ordinary care. The rule in most of the states is that it is not incumbent on plaintiff, in an action for negligence, to allege a want of contributory negligence;[2] but, where the facts stated in the complaint or declaration show affirmatively that he was guilty of

§ 432. [1] See post. § 476.

[2] House v. Meyer, 100 Cal. 592, 35 Pac. 308; Favre v. Railroad Co., 91 Ky. 541, 16 S. W. 370; Clark v. Railway Co., 28 Minn. 69, 9 N. W. 75; Hickman v. Railroad Co., 66 Miss. 154, 5 South. 225; Thompson v. Railroad Co., 51 Mo. 190; Loyd v. Railroad Co., 53 Mo. 509; Higley v. Gilmer, 3 Mont. 90; Durant v. Palmer, 29 N. J. Law, 544; Lee v. Gaslight Co., 98 N. Y. 115; Johnston v. Railway Co., 23 Or. 94, 31 Pac. 283; Crouch v. Railway Co., 21 S. C. 495; Texas & P. Ry. Co. v. Murphy, 46 Tex. 356; Missouri Pac. Ry. Co. v. Watson, 72 Tex. 631, 10 S. W. 731; Norfolk & W. R. Co. v. Gilman's Adm'r, 88 Va. 239, 13 S. E. 475; Carrico v. Railway Co., 35 W. Va. 389, 14 S. E. 12; Fowler v. Railroad Co., 18 W. Va. 579. That contributory negligence of a plaintiff is, in the courts of the United States, a defense to be brought forward by defendant, seems to be absolutely settled by the supreme court of the United States. Clark v. Railway Co., 69 Fed. 544, citing Farlow v. Kelly, 108 U. S. 288, 2 Sup. Ct. 555; Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321; Texas & P. Ry. Co. v. Johnson,

contributory negligence, the question may be raised by demurrer.[3]

In Indiana the rule is that it must affirmatively appear from the averments of the complaint that the injured party was without fault. This may be by the simple general averment that he was without fault, or there may be such a statement of facts, without any such general averment, as will be sufficient.[4] Thus, a complaint which alleges that a train on which plaintiff was a passenger was thrown from the track by means of a broken rail and defective cross-ties,[5] or

151 U. S. 85, 14 Sup. Ct. 250; Chicago, M. & St. P. Ry. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281. Act N. C. 1887, c. 33, requires, in actions for damages caused by negligence, contributory negligence to be set up in the answer and proved on the trial. Jordan v. City of Asheville, 112 N. C. 743, 16 S. E. 760. In Ohio the rule is that it is not necessary to allege in the petition that the injury was caused without the fault or negligence of plaintiff, unless the other averments necessary to state a cause of action suggest the inference that plaintiff may have been guilty of contributory negligence. Street R. Co. v. Nolthenius, 40 Ohio St. 376. The defense of imputed negligence must also be pleaded in the answer. Missouri, K. & T. Ry. Co. v. Jamison (Tex. Civ. App.) 34 S. W. 674.

[3] Favre v. Railroad Co., 91 Ky. 541, 16 S. W. 370; Clark v. Railway Co., 28 Minn. 69, 9 N. W. 75. So, where contributory negligence is shown by plaintiff's own proof, it will avail defendant, and it is no objection to the defense that it was not specially pleaded. McMurtry v. Railway Co., 67 Miss. 601, 7 South. 401; Schultze v. Railway Co., 32 Mo. App. 438.

[4] Ft. Wayne, C. & L. R. Co. v. Gruff, 132 Ind. 13, 31 N. E. 460; Jeffersonville R. Co. v. Hendricks' Adm'r, 26 Ind. 228. An allegation in the complaint that plaintiff was without "fault" is equivalent to an allegation that he was free from negligence contributing to the accident. Evansville & T. H. R. Co. v. Weilke, 6 Ind. App. 340, 33 N. E. 639.

[5] Michigan, S. & N. I. R. Co. v. Lantz, 29 Ind. 528.

that the train was precipitated into a river by the breaking of a bridge over which it was passing,[6] is sufficient, without expressly alleging that plaintiff was without fault. But a complaint which alleges that plaintiff was injured by stepping, in obedience to the conductor's direction, from a moving train, in the nighttime, as it was passing his station, is fatally defective, if it contains no averment that he was without fault on his part.[7] But, though there is an averment in the complaint that plaintiff was without fault or negligence, yet if the facts stated clearly show that he was guilty of contributory negligence, a demurrer will be sustained.[8]

[6] Bedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 551.

[7] Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 168. A complaint which alleges that, owing to the crowded condition of the cars, plaintiff rode on the roof of one of them pursuant to a direction from the conductor, and that he was knocked therefrom by a low overhead bridge, of the existence of which he was ignorant, is fatally defective, if it contains no averment that plaintiff was in the exercise of due care. Maxfield v. Railroad Co., 41 Ind. 269.

[8] Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 168. Where the sufficiency of a complaint is questioned, not by demurrer, but after verdict by motion in arrest, or by assignment of error in the appellate court, all intendments are in favor of the pleading; and, if it contains a statement of facts sufficient to bar another suit for the same cause of action, its defects, if any, are cured by the verdict, and it will be treated sufficient to uphold the judgment. Hence, though a complaint contains no express averment that plaintiff was free from negligence, yet it will be held sufficient in this respect after verdict, if the facts alleged show this to be so by indulging the most liberal intendment. Ohio & M. Ry. Co. v. Smith, 5 Ind. App. 560, 32 N. E. 809. Failure to allege in the declaration that plaintiff exercised due care is cured by a verdict in his favor, since, without proving due care, plaintiff could not have succeeded. Illinois Cent. R. Co. v. Simmons, 38 Ill. 242.

In states where contributory negligence is a matter of defense, the facts relied on as constituting contributory negligence should be stated. A mere allegation that plaintiff was guilty of negligence, which proximately caused and contributed to the injury, is bad.[9] But an allegation in the answer that plaintiff's injuries were caused by her "carelessness, fault, and want of care" is sufficient, where plaintiff does not demur or move to make more definite and certain, but denies the allegation in the reply.[10] Where the issue of contributory negligence is treated by both parties, without objection, as being in the case at the trial, the fact that no plea of contributory negligence was filed is immaterial.[11]

§ 433. SAME—ACTIONS FOR EJECTION OR FAILURE TO CARRY TO DESTINATION.

In an action for ejection from a train, it is not enough for plaintiff to aver generally that he was wrongfully put off, but he must allege the facts showing that he was rightfully on the train,[1] and, as incident thereto, that the rules of the company provided for the stoppage of the train at the station named in

[9] Johnson v. Railroad Co., 104 Ala. 241, 16 South. 75.

[10] Brown v. Railway Co. (Wash.) 47 Pac. 890.

[11] Hill v. Railway Co., 100 Ala. 447, 14 South. 201. Under a general denial in an answer, contributory negligence may be proved; and hence a further special defense in the answer setting up contributory negligence should be stricken out on motion. Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82.

§ 433. [1] Barnum v. Railroad Co., 5 W. Va. 10.

his ticket,[2] and that he exhibited or tendered his ticket or fare to the conductor.[3] But it is not necessary that plaintiff should allege a strictly legal tender of fare, and it is sufficient to allege that he was ready and willing and offered to pay defendant the full legal charge.[4] Nor is it necessary to allege that at the time of the expulsion the passenger was complying with all the reasonable rules of the company, or that he was not about to violate any such reasonable rules.[5]

Where the petition proceeds on the theory that the ejection was wrongful, there can be no recovery on

[2] Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611. So, in an action for being carried past his destination, the complaint should allege that the train on which plaintiff was a passenger was one which, by its public running arrangements, was scheduled to stop at plaintiff's destination. Ohio & M. Ry. Co. v. Hatton, 60 Ind. 12.

[3] White v. Railroad Co., 133 Ind. 480, 33 N. E. 273. A complaint which merely alleges that plaintiff was on one of defendant's trains when he was ordered or commanded to jump off by defendant's servants while the train was in motion should be made more specific on motion, by an averment of facts showing in what capacity he was on the train. If he was a passenger, defendant would be required to exercise a high degree of care for his safety. If he was an employé, it would not be liable for the negligent acts of his co-employés. If he was a trespasser, it must appear that the servants ordering him off were acting in the scope of their employment. Pennsylvania Co. v. Dean, 92 Ind. 459.

[4] Tarbell v. Railroad Co., 34 Cal. 616.

[5] South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633. Nor is it necessary to allege negligence of defendant, and want of contributory negligence on part of plaintiff. Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842. A complaint which alleges that, at a station on defendant's road, plaintiff got upon the platform of one of defendant's cars in a regular passenger train for the purpose of entering the coach as a passenger; that, while he was thus lawfully entering the coach, one of defendant's employés wrongfully

the theory that excessive force was used in making a rightful expulsion.[6] And an averment that the servants of the company "did forcibly, and with great violence, thrust and eject plaintiff from said cars," does not imply that excessive force was used.[7]

Where the facts stated in a complaint show that the conductor was acting in the line of his employment when he pulled a passenger off the train, failure to aver in direct terms that he was so acting does not render the complaint defective.[8] So a complaint which alleges that defendant, acting through its agents and servants, injured plaintiff, is sufficient, without alleging that the servants were acting in the line of their employment when they committed the grievances complained of.[9] But an allegation that plaintiff was assaulted by one of defendant's servants while riding on one of its freight trains, and thrown from the train

and forcibly seized him, and pulled him off the car, and, while the train was in motion, so severely jerked him as to cause him to fall between the moving cars and the station platform, whereby he received serious personal injury,—charges an unlawful assault directly causing the injury complained of, and certainly states a cause of action. Harrold v. Railroad Co., 47 Minn. 17, 49 N. W. 389.

[6] Logan v. Railroad Co., 77 Mo. 663. See, also, post, § 443.

[7] Churchill v. Railroad Co., 67 Ill. 390. "Plaintiff may have resisted with such violence as to require all the force that was used; and as the company had the right to use all the force necessary for his expulsion on his refusing to pay fare or leave the train on being requested, and he fails to aver that he did not resist, and that the force employed was wanton, we cannot presume excessive force was used by the company." Id.

[8] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197.

[9] Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

and under the wheels, does not state a cause of action, in the absence of any allegation as to the character of service which the servant was employed to perform.[10]

§ 434. SAME—ALLEGING DAMAGES.

Damages which necessarily result from the act complained of are denominated "general damages," and may be proved under the ad damnum clause or general allegation of damage; while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed "special damages." The defendant must be presumed to know the damages which necessarily result from the act done, and therefore he cannot be held to be taken by surprise when proof is offered of such necessarily resulting damage. But as to the damage naturally, though not necessarily, resulting from the act done, the defendant cannot be presumed to be aware of, and therefore, in order to prevent a surprise on defendant, it must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it at

[10] Smith v. Railroad Co., 124 Ind. 394, 24 N. E. 753. A complaint which alleges that plaintiff was admitted as a passenger on defendant's train on a specified day and at a specified station, and that he was ejected therefrom by defendant, through its servants, while the train was in motion, about 10 miles from the point of his embarkation, is sufficiently specific, without describing the kind of train, the particular servant or agent, or the time of day the train left the station where plaintiff took passage. Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. In an action for carrying a passenger past her destination, and in compelling her to leave the train a quarter of a mile therefrom, it is not necessary to set out a copy of the ticket in the complaint. Evansville & R. R. Co. v. Kyte, 6 Ind. App. 52, 32 N. E. 1134.

the trial.[1] Thus, impairment of capacity to earn money or to attend to one's business need not be specially pleaded, where the nature of the injuries alleged show that this must necessarily be so;[2] as the loss of an eye,[3] or internal injuries from which plaintiff can never recover.[4] But loss of earnings during sickness is a kind of injury which is not regarded as a necessary consequence of a permanent crippling, disabling, and disfiguring of plaintiff, and therefore is not embraced in a general allegation of damages. It is one sort of special damages, and consequently must in some wise be counted on to constitute a basis for evidence on the subject.[5] So there can be no recovery for loss of time

§ 434. [1] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266; Hunter v. Stewart, 47 Me. 419; Baldwin v. Navigation Co., 4 Daly (N. Y.) 314; Texas & P. Ry. Co. v. Curry, 64 Tex. 85. See, also, post, § 444.

[2] Hamilton v. Railway Co., 17 Mont. 334, 43 Pac. 713.

[3] Texas & P. Ry. Co. v. Bowlin (Tex. Civ. App.) 32 S. W. 918. A petition which alleges that plaintiff was injured in a specified manner, and that, as a result of such injuries, his capacity to labor and his eyesight have been seriously and permanently impaired, is sufficiently specific. Missouri, K. & T. Ry. Co. v. Huff, Id. 551.

[4] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266. A declaration by a married woman against a street-railway company for injury to her person, which alleges a definite personal injury which incapacitated her from walking without crutches, embraces, by necessary implication, the impairment of her capacity to labor. Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. 825.

[5] Mellor v. Railway Co., 105 Mo. 455, 16 S. W. 849; Slaughter v. Railway Co., 116 Mo. 269, 23 S. W. 760. In an action by a married woman, loss of earnings cannot be recovered, unless the complaint specially alleges the loss of such earnings, or that she was carrying on a business on her sole and separate account, or that she was allowed by her husband to apply to her own use the wages earned by her. Bloom v. Railway Co., 63 Hun, 629, 17 N. Y. Supp. 812.

suffered by reason of the ejection from a train, unless it has been pleaded.[6] But, where the petition claims damages for loss of time for injuries causing permanent disability, it is not necessary that the petition allege the character of plaintiff's occupation, and the particulars as to his earnings, to authorize the introduction of evidence showing his occupation and the extent of his earnings.[7]

In actions sounding in tort, plaintiff is not required to plead the items of damages with that particularity, specifying dates, persons, amounts, and items, that is demanded in a suit on contract. A general averment that plaintiff expended a certain amount for doctor's bills and a certain amount for drugs is sufficient.[8]

As to exemplary damages, it is not necessary that

[6] Gulf, C. & S. F. Ry. Co. v. Sparger (Tex. Civ. App.) 32 S. W. 49. An unmarried woman receiving an injury by the negligence of a common carrier, in whose carriage she was upset, cannot recover damages on account of her prospect as to marriage being impaired, where such damages are neither specially pleaded nor sustained by the evidence. Hunter v. Stewart, 47 Me. 419.

[7] Flanagan v. Railroad Co., 83 Iowa, 639, 50 N. W. 60.

[8] Missouri, K. & T. Ry. Co. v. Simmons (Tex. Civ. App.) 33 S. W. 1096. Where facts alleged in the declaration authorize the recovery of general damages, the declaration is not vitiated by a clause which states that the "entire injury is to her peace, happiness, and feelings," although this theory of the injury be incorrect. Cox v. Railroad Co., 87 Ga. 747, 13 S. E. 827. A complaint in an action for personal injuries contained three counts, each having reference to the same accident, and each alleging the damages in the sum of $10,000. The complaint concluded with a general prayer for judgment for damages in the sum of $20,000. Held, that the allegation as to damages at the end of each count could be disregarded, and a verdict for $15,000 should be upheld, under the general prayer for judgment. Schultz v. Railroad Co., 89 N. Y. 247.

they shall be claimed, eo nomine, in the declaration. It is enough that the facts alleged and proved be such as to warrant their assessment.[9] But, where a party intends to prove malice to affect damages, he must expressly aver the same.[10]

§ 435. SAME—JOINDER OF CAUSES OF ACTION.

Where husband and wife are injured in the same accident, the husband may join in one complaint a cause of action for his injuries and a cause of action for loss of the wife's services and expenditures incurred in curing her.[1] But a father cannot join a cause of action for personal injuries to himself with one for the death of a minor child occurring in the same accident. The cause of action for the death is statutory, and the damages inure, not to the father, but for the benefit of the next of kin.[2]

[9] Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200; Alabama G. S. R. Co. v. Arnold, 84 Ala. 160, 4 South. 359.

[10] Johnson v. Railroad Co., 51 Iowa, 25, 50 N. W. 543. In an action for failure to stop a train and receive plaintiff as a passenger, where the petition fully states the facts, and plaintiff prays for both actual and exemplary damages, he is not confined to the amount prayed for in the petition as actual damages, though no exemplary damages can be recovered, if it clearly appears that, under his averment of exemplary damages, the pleader included elements of damages that were merely actual. International & G. N. R. Co. v. Gordon, 72 Tex. 44, 11 S. W. 1033.

§ 435. [1] Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297; Devino v. Railroad Co., 63 Vt. 98, 20 Atl. 953.

[2] Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297.

§ 436. DEFENSIVE PLEADINGS.

Both the general issue in an action on the case at common law, and the general denial under the Codes, put in issue all the material facts averred in the declaration or the complaint.[1] An allegation in a declaration that, after the injuries to plaintiff, the corporation inflicting them was consolidated with defendant, and that defendant assumed its liabilities, is denied by the general issue, and, to enable plaintiff to recover against defendant, he must prove the allegation.[2]

At common law, where the defense consists of matter of fact merely in denial of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a special plea in bar is bad, as amounting to the general issue.[3] Hence, in an action for personal injuries, where plaintiff alleges that defendant received him in its cars to safely transport him for "hire and reward," a special plea that plaintiff was "riding with a free ticket, without charge, and as a consideration thereof assumed all risk of accident," is bad, as amounting to the general issue.[4]

Under the Code, an allegation in the answer, "upon defendant's information and belief," that plaintiff was not injured in the accident alleged in the complaint, is not sufficient. There should be a direct denial of any

§ 436. [1] 1 Chit. Pl. 490, 491; Pom. Rem. § 660.

[2] Zealy v. Electric Co., 99 Ala. 579, 13 South. 118.

[3] 1 Chit. Pl. *527; Steph. Pl. *418, rule 2.

[4] Kimball v. Railroad Co., 55 Vt. 95.

knowledge or information sufficient to form a belief of the allegations in the complaint as to the injury.[5]

§ 437. AMENDMENTS.

In some of the states, the rule prevails that a party cannot by amendment change his cause of action.[1] Thus, a declaration sounding in tort against a railroad company for violation of its duty as a common carrier is not amendable by converting it, in whole or in part, into an action upon the contract to carry.[2] But an amendment stating that plaintiff was traveling on a "ticket," instead of a "first-class ticket," and that defendant was chartered by an act of congress, instead of by the laws of a state, as averred in the original complaint, does not state a new cause of action.[3] So, a declaration which alleges that plaintiff was expelled from a train because he refused to pay the higher train

[5] Powers v. Railroad Co., 3 Hun (N. Y.) 285. Compare Jones v. Ludlum, 74 N. Y. 61. A demurrer does not lie to a complaint, or to any entire count, because some of the special damages claimed are not recoverable. The remedy is by motion to strike out, by objection to the evidence when offered, or by a request for instructions to the jury. Alabama G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236.

§ 437. [1] Pom. Rem. § 566.

[2] Cox v. Railroad Co., 87 Ga. 747, 13 S. E. 827. In an action for injuries to a passenger caused by the derailment of a train, the original petition alleged that the derailment was caused by a defective roadbed. Held, that an amendment alleging that it was caused by a defective axle did not set up a new cause of action, the negligent derailment being the gravamen of the action. Texas & P. Ry. Co. v. Buckalew (Tex. Civ. App.) 34 S. W. 165.

[3] Atlantic & P. R. Co. v. Laird, 17 Sup. Ct. 120, affirming 7 C. C. A. 489, 58 Fed. 760.

fare may be amended by adding an allegation that he could not procure a ticket at the station owing to the absence of the ticket agent.[4] So, a declaration that a passenger rightfully on a train was ejected while it was in motion may be amended at the trial so as to show that he was unlawfully on the train, but ejected while it was in motion, under the Michigan statute of amendments, which permits amendments "in substance." [5] Nor is it error to permit an amendment of the petition increasing the amount claimed as damages.[6] Nor is it an abuse of discretion to permit an amendment of a petition by changing the date at which a matter is alleged to have taken place, though by the former date the action was barred, and by the latter not.[7]

§ 438. PLEADING AND PROOF—VARIANCE.

Proofs adduced at the trial must sustain and correspond with the allegations in the pleadings, and a material variance is fatal; but, under the Codes, a variance is not fatal, unless it amounts to a total failure of proof of the cause of action or defense pleaded.

Even at common law, a party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters, the variance is immaterial. If the whole of an averment may be

[4] Georgia R. & B. Co. v. Murden, 83 Ga. 753, 10 S. E. 364.

[5] Brassel v. Railway Co., 101 Mich. 5, 59 N. W. 426.

[6] McDonald v. Railroad Co., 26 Iowa, 124.

[7] Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145. Rev. St. Mo. 1879,

stricken out without destroying the plaintiff's right of action, it is not necessary to prove it.[1] Hence, where the gist of an action for personal injuries is the sudden starting of a street car or train while plaintiff was alighting, it is not necessary to prove an allegation that the car was stopped at plaintiff's request, since the act of stopping is productive of no injury, and is in no respect complained of,[2] nor is it necessary to prove an allegation that plaintiff was on the lower car step when the train started.[3] So, in an action against a railroad company for an assault and battery by one of its servants, it is not necessary to state the name of the servant in the declaration; and, if stated, the name may be regarded as surplusage, and need not be proved as alleged.[4]

§ 439. SAME—ALLEGATIONS AS TO PLACE.

Even at common law, allegations as to place are considered immaterial. It has, however, been held, in an action for injuries to a passenger, that though it is

§ 3540, which provides that, where a second amended pleading is adjudged insufficient, no further pleading shall be filed, but judgment shall be rendered, applies only where the defective pleading has in each instance been adjudged insufficient on demurrer or motion to strike out, as provided in sections 3538, 3539. It is not sufficient that the pleading has been held bad on objection to the introduction of evidence, on the ground that it stated no ground of action. Spurlock v. Railway Co., 93 Mo. 13, 5 S. W. 15.

§ 438. [1] Williamson v. Allison, 2 East, 446; Maxwell v. Maxwell, 31 Me. 184.

[2] Chicago W. D. Ry. Co. v. Mills, 105 Ill. 63.

[3] McCaslin v. Railway Co., 93 Mich. 553, 53 N. W. 724.

[4] Toledo, W. & W. Ry. Co. v. Williams, 77 Ill. 354.

sufficient for plaintiff to allege merely that he was a passenger on defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's road, yet, if he goes into the details, and alleges that he became and was a passenger from K. to G., he must prove the allegations as laid; and evidence that his passage began at another point to a different destination than that alleged constitutes a fatal variance, though the stations named in the declaration are intermediate points on his journey, and though the accident occurred between them.[1] So, in an action for injuries sustained by a passenger in alighting from a street car, proof that the car stopped on the east side of the street, where it was unlaw-

§ 439. [1] Wabash W. Ry. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111, reversing 41 Ill. App. 270. In an action for injuries sustained by the upsetting of a stagecoach, plaintiff alleged that he took passage from Albany to Boston, and proved that he took passage from Worcester to Boston. Held a fatal variance, the court saying: "We think there was no proof at the trial of the contract alleged in the declaration. The declaration alleges a contract on the part of defendants to transport plaintiff from Albany to Boston. The proof was that plaintiff rode in defendant's stagecoach from Worcester to Boston; and, although this is a part of the route from Albany to Boston, yet it is part also of many other lines of travel, so that the contract as alleged remains without proof." Harris v. Rayner, 8 Pick. (Mass.) 541. An allegation that defendant undertook to carry plaintiff from West Urbana to Tolono is sustained by proof of an undertaking to convey from Champaign City to Tolono, where it appears that Champaign City and West Urbana are one and the same place. Illinois Cent. R. Co. v. Sutton, 53 Ill. 397. An allegation that an injury to a passenger was inflicted in the county of Talbot is sufficiently sustained by proof that it occurred between two points, both located on the line of defendant's railroad in that county. Central R. & B. Co. v. Gamble, 77 Ga. 584, 3 S. E. 287.

ful for it to do so, constitutes a fatal variance from an allegation in the complaint that it stopped at the west side, the lawful stopping place.[2]

§ 440. SAME—ALLEGATIONS OF NEGLIGENCE.

Where the petition alleges a specific act of negligence as the ground of plaintiff's action, there can be no recovery for any other act.[1] The plaintiff cannot aver negligence in one particular, and on the trial prove that defendant was negligent in another regard. One object of a declaration is to state the facts relied on for recovery so plainly that the defendant may be prepared to meet them. This object in pleading would be entirely defeated if a plaintiff had a right to aver in his declaration one ground of action, and on the trial prove another and different one.[2]

In an English case it was held that, under an allegation that defendant negligently "drove, conducted, and managed the coach," there can be no recovery on

[2] North Birmingham St. Ry. Co. v. Calderwood, 89 Ala. 247, 7 South. 360.

§ 440. [1] Price v. Railway Co., 72 Mo. 414. In this case it was held that, under an allegation that the train did not stop a reasonable length of time to enable plaintiff to alight, there can be no recovery on proof that the platform was not lighted.

[2] Toledo, W. & W. Ry. Co. v. Foss, 88 Ill. 551. But an averment in a complaint that "defendant negligently conducted itself in and about the carrying of plaintiff's intestate" is broad enough to cover the omission of any duty which the carrier owed the passenger, including the employment of competent, skillful, and careful servants. Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57. It would seem that such a complaint is not sufficiently specific. See ante, § 431.

proof of negligence in sending out an unsound coach.[3] But in this country it has been held that, under an allegation that defendant so negligently conducted itself in the management of an electric street car that it ran against a plank on the track, evidence is admissible that the brake was defective, and that, therefore, the motorman was unable to check the speed of the car.[4] So, the condition of the track, combined with the rate of speed, are circumstances which may be proved under an allegation that the injury was occasioned by the negligent management of defendant's car.[5] The fact that a petition charges negligence of a driver of a street car in prematurely starting it while plaintiff was alighting, while the evidence proves, not only this fact, but also that a defective brake contributed to the starting of the car, does not constitute a fatal variance.[6] So, in an action for injuries sustained in alighting from a street car, an allegation that defendant "so carelessly, negligently, and unskillfully managed and directed said car as to run said car upon and over the plaintiff," is broad enough to admit evidence that the negligence consisted in part in not stopping the car

[3] Mayor v. Humphries, 1 Car. & P. 251. But under an allegation that defendant did not use due and proper care to safely transport a passenger by stagecoach, but wholly neglected so to do, whereby the stagecoach was overturned, evidence is admissible that the coach was overloaded, that the team was unsafe and timid, and that it was unsafe to drive six horses. Taylor v. Day, 16 Vt. 566.

[4] Cogswell v. Railway Co., 5 Wash. 46, 31 Pac. 411.

[5] Haderlein v. Railroad Co., 3 Mo. App. 601.

[6] Buck v. Power Co., 108 Mo. 179, 18 S. W. 1090.

at the proper time.[7] An allegation that the train had come to a full stop, and started with a sudden jerk while plaintiff was alighting, does not vary fatally from evidence that the train was moving slowly, and that plaintiff was thrown from the lower car step by a sudden jerk, since the complaint and the evidence both show the proximate cause of the injury to have been the sudden jerk.[8]

But an allegation that the injury was caused by the negligent management of a train of cars, whereby the engine and some of the cars were violently backed into the coach in which plaintiff was a passenger, does not authorize a recovery on the theory that defendant was guilty of negligence in permitting plaintiff to remain in the car after it had reached its destination, regardless of the negligent handling of the train.[9] But, in such a case, an allegation that the engineer negligently

[7] Brennan v. Railroad Co., 45 Conn. 284. Where it is sought to charge a street-railroad company in a personal injury case with the violation of a duty imposed by ordinance (in this case, to have a conductor on the car), the ordinance must be pleaded. Gardner v. Railway Co., 99 Mich. 182, 58 N. W. 49.

[8] Cincinnati, H. & I. R. Co. v. Revallee (Ind. App.) 46 N. E. 353. Evidence that defendant failed to erect a guard rail along a station platform is admissible in an action for negligently overcrowding the platform, so that plaintiff was pushed off. McGearty v. Railway Co. (Sup.) 43 N. Y. Supp. 1086.

[9] Chicago, K. & W. Ry. Co. v. Bell, 1 Kan. App. 71, 41 Pac. 209. Under an allegation that defendant carelessly ran its train on which plaintiff was a passenger against a horse, it is not competent for plaintiff to prove that the track was not properly fenced, or that the cars were not provided with steam brakes, or any other negligence than that averred. Toledo, W. & W. Ry. Co. v. Foss, 88 Ill. 551.

and carelessly ran the engine is sufficient to admit evidence that he omitted to sound the bell and whistle to warn passengers in the coaches of his approach.[10]

Under an allegation that a car was derailed through the negligence of defendant's servants, evidence that the derailment was caused by the spreading of the track, which resulted from the want of proper support by the ties, is admissible.[11] But, where the suit is for injury to a steamboat passenger by reason of the negligence of defendant's servants in allowing a bale of cotton to fall and injure plaintiff, evidence to show defects in the construction of the boat is irrelevant, and should be rejected.[12]

Under an allegation of the unsafe condition of a car, in an action for injuries sustained in its derailment, evidence is admissible that it was run at a high rate of speed, with the stove full of burning coals, and the stove door wide open.[13] So, under an allegation that defendants "carelessly and negligently provided and fitted out" their stagecoach, plaintiff may prove that the nut to secure one of the wheels became unfastened, the wheel came off, and the coach broke down. The terms "provided" and "fitted out" extend to the sufficiency or safety of the coach for the transportation of passengers, and are not confined to convenient internal accommodations.[14]

Under an allegation that defendant kept its "road-

[10] Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737.

[11] Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104.

[12] Memphis & O. R. Packet Co. v. McCool, 83 Ind. 392.

[13] Dunn v. Railway Co., 35 Minn. 73, 27 N. W. 448.

[14] Ware v. Gay, 11 Pick. (Mass.) 106.

bed" in an imperfect and unsafe condition, evidence as to the condition of the rails and ties is admissible, since the term "roadbed" includes the "track." [15] Evidence that the train was operated at an unsafe and dangerous rate of speed is also admissible, since the question of dangerous speed depends on the character of the roadbed; [16] and evidence is likewise admissible to show that defendant's section foreman failed to inspect the track.[17] Where the petition alleges that the derailment of the train was caused by a broken rail, and that parts of the rail were missing, proof of either of these facts will authorize a recovery, and it is not necessary for plaintiff to prove both.[18] But an allegation that the wreck in which plaintiff was injured was caused by a defective roadbed does not permit proof that it was caused by a broken axle.[19]

[15] Dunn v. Railway Co., 35 Minn. 73, 27 N. W. 448; Andrews v. Railway Co., 86 Iowa, 677, 53 N. W. 399.

[16] Dunn v. Railway Co., 35 Minn. 73, 27 N. W. 448. Under a complaint which alleges that it is "wholly and entirely unsafe and dangerous to run a train" over a bridge "on account of its unsecure and dangerous condition," evidence is admissible to show that the train was run over the bridge at a rapid rate of speed. Louisville, N. A. & C. R. Co. v. Pedigo, 108 Ind. 482, 8 N. E. 627.

[17] Texas & P. Ry. Co. v. Barron, 4 Tex. Civ. App. 546, 23 S. W. 537.

[18] Texas & P. Ry. Co. v. Kirk, 62 Tex. 227.

[19] Texas & P. Ry. Co. v. Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994. Where a passenger alleges and testifies that she was injured in getting off a street car by stepping on a ridge of earth in close proximity to the track, she cannot recover on proof that some one stepped on her dress as she was alighting, thereby throwing her to the ground. Poole v. Railway Co., 100 Mich. 379, 59 N. W. 390. In an action for injuries received while descending the platform steps to reach a train which had backed away from the station during a stop for supper, evidence that the waiting room at the station was

§ 441. SAME — ALLEGATIONS OF GROSS NEGLIGENCE AND WILLFULNESS.

Though plaintiff in a personal injury suit alleges defendant's negligence to have been gross, he need prove actionable negligence only.[1] So where a petition alleges that plaintiff was a passenger on defendant's train, and that he was injured by the gross negligence of its employés, proof of gross negligence authorizes a recovery without proof that he was a passenger, under a statute which renders a railroad company liable for all damages sustained by any person in consequence of the neglect of agents.[2]

But it seems that, where the complaint alleges that personal injuries were "willfully" caused by defendant, no recovery can be had for mere negligence; willfulness, or its equivalent, recklessness or wantonness, must be proved.[3] Thus, under a complaint alleging that plaintiff was compelled to leave a moving street car by the conductor, there can be no recovery on proof that plaintiff voluntarily attempted to alight from the moving car, and was injured by its sudden increase of speed.[4] So, under an allegation that de-

filled with tobacco smoke, crowded, and offensive, is admissible to show that plaintiff was justified in leaving the room and seeking the cars before the train returned to the platform, though the offensive nature of the waiting room was not pleaded. McDonald v. Railroad Co., 29 Iowa, 170.

§ 441. [1] Keating v. Railroad Co., 104 Mich. 418, 62 N. W. 575.

[2] Way v. Railway Co., 73 Iowa, 463, 35 N. W. 525.

[3] Highland Ave. & B. R. Co. v. Winn, 93 Ala. 306, 9 South. 509.

[4] Id.

fendant "willfully refused to stop" its train at the station of plaintiff's destination, there can be no recovery on evidence that the failure to stop was merely negligent.[5] It has even been held that, where a plaintiff alleges conjunctively that defendant "failed and refused to stop its train" at plaintiff's destination, it is essential to a recovery to prove that defendant not only failed, but willfully refused, to stop the train at the station.[6] So, where the complaint alleges that a passenger was "assaulted and willfully thrown from a train," receiving injuries from which he died, there can be no recovery on proof that he was killed, while trespassing on the track, by being struck by a passenger train.[7]

On the other hand, it has been held that, under a complaint averring only simple negligence, evidence of willful injury, or of such reckless or wanton negligence as to be the equivalent of willful or intentional wrong on the part of defendant, is inadmissible.[8] But where a declaration alleges that a carrier "willfully, negligently, and wrongfully" did certain acts, while the evidence shows mere negligence, the averments as to willfulness may be treated as surplusage, and there is no fatal variance.[9]

[5] Louisville & N. R. Co. v. Johnston, 79 Ala. 436.

[6] Louisville & N. R. Co. v. Dancy, 97 Ala. 338, 11 South. 796.

[7] Brown v. Railway, 52 Ark. 120, 12 S. W. 203.

[8] Louisville & N. R. Co. v. Markee, 103 Ala. 160, 15 South. 511.

[9] Alabama & V. Ry. Co. v. Hanes, 69 Miss. 160, 15 South. 246, disapproving Highland Ave. & B. R. Co. v. Winn and Louisville & N. R. Co. v. Johnston, supra.

§ 442. SAME — ALLEGATIONS BY PLAINTIFF NEGATIVING CONTRIBUTORY NEGLIGENCE.

It has been held that, though plaintiff in an action for personal injuries need not aver that he was in the exercise of due care and diligence, yet if he does so allege it, and the allegation is traversed by the general issue, plaintiff must prove it, and it cannot be treated as immaterial.[1] In an action for injuries sustained in alighting from a moving train, an allegation that plaintiff was not guilty of any negligence contributing to her injury entitles her to prove that she acted with the conductor's consent, since her act would otherwise be unlawful, under the Iowa statute, which prohibits passengers from getting off a moving train without the conductor's consent.[2]

§ 443. SAME — IN ACTIONS FOR EJECTION AND FAILURE TO CARRY TO DESTINATION.

It is well settled that one cannot sue for breach of one duty, and recover for the breach of another. Thus, in an action for wrongful expulsion from a train in violation of plaintiff's rights as a passenger, there can be no recovery on the theory that unnecessary force and violence were used in ejecting him from the train.[1] So, under a declaration which proceeds on the theory that plaintiff was ejected from a freight train through

§ 442. [1] Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364.

[2] Raben v. Railway Co., 74 Iowa, 732, 34 N. W. 621.

§ 443. [1] White v. Railroad Co., 133 Ind. 480, 33 N. E. 273. See, also, ante, § 433.

the fault of the conductor, there can be no recovery on proof that the ticket agent informed him that he could ride on that train under his ticket.[2] Under a petition alleging that a brakeman acted under the order and direction of the conductor in ejecting plaintiff from a train, evidence of a general custom of brakemen to eject trespassers is not admissible.[3] So, in an action for ejection from a train for refusal to pay the train fare, where the sole ground of recovery alleged in the complaint is the failure to keep the ticket office open, evidence as to the unfitness of the station house for passengers awaiting trains is properly excluded.[4]

On the other hand, in an action for ejection from a train with unnecessary violence, it is wholly immaterial to prove that plaintiff acted with proper care in entering the train, or that he got on the wrong train by mistake of the ticket agent. The right of plaintiff to protection from excessive force would be the same, whether he was a trespasser or rightfully on the train.[5]

2 Thomas v. Railway Co., 72 Mich. 355, 40 N. W. 463.

3 Lyons v. Railway Co. (Tex. Civ. App.) 36 S. W. 1007.

4 Everett v. Railway Co., 69 Iowa, 15, 28 N. W. 410. Under an allegation that plaintiff, after being carried past her station for half a mile, was put off the train "against her protest and objection," there can be no recovery if the evidence shows that she voluntarily left the train. Louisville & N. R. Co. v. Dancy, 97 Ala. 338, 11 South. 796.

5 Chicago, St. L. & P. R. Co. v. Bills, 118 Ind. 221, 20 N. E. 775. A complaint alleging that defendant, by its servants, prevented plaintiff, after boarding one of its cars, from entering the same, and that they without cause, willfully, maliciously, violently, and brutally pushed, kicked, and ejected him from and off the steps of the coach, while the train was rapidly moving, states a cause of action founded in tort, the gravamen being an intentional assault and battery; and hence, though the complaint also alleges that plaintiff was a passen-

But, under allegations that plaintiff was knocked and kicked from defendant's railway train by its conductor, he may recover on proof that the conductor alarmed him to such an extent that he jumped off the train; forcing him off the train in an unlawful manner being the gravamen of the complaint.[6] But, under an allegation that plaintiff was forced or compelled to leave a moving train, there can be no recovery on evidence that, as the train was approaching the station, the conductor called its name, and said, "We have got no time to lose, hurry up!" repeating this several times as plaintiff was leaving the car.[7]

When several acts done to a plaintiff are combined in one allegation as causing him injury, some of which the plaintiff may fail to prove, or for some of which the defendant may not be responsible, it would be

ger, evidence that he was merely a trespasser does not constitute a fatal variance, since no right exists to eject even a trespasser from a rapidly moving train. Mykleby v. Railway Co., 39 Minn. 54, 38 N. W. 763.

[6] Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440. Under an allegation that the conductor wrongfully compelled plaintiff to leave a train, evidence is admissible to show that plaintiff was ejected by a flagman acting under the conductor's orders. Alabama G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236.

[7] South & N. A. R. Co. v. Schaufler, 75 Ala. 136. Under a declaration for being wrongfully put off the train at a place remote from the station, there can be no recovery on proof that plaintiff was landed near the station after midnight, and that the carriage which had called for him had gone when he reached the station, that all places of shelter were then closed, and all conveyances gone, and that he was obliged, while suffering from fever, to walk home three-quarters of a mile in a freezing rain. Harding v. Railway Co., 56 Mich. 628, 23 N. W. 445.

construing a declaration too narrowly to hold that unless all were proved there could be no recovery.[8] Hence, where a complaint alleges that plaintiff took a wrong train because of the ticket agent's misdirection, and that he was forcibly ejected therefrom by the conductor, failure to prove the wrongful ejection does not constitute a fatal variance, so as to preclude recovery for the misdirection. Suing for two torts, and proving only one, affects only the extent of the recovery.[9]

§ 444. SAME—ALLEGATIONS AS TO DAMAGES AND INJURIES.

The actual known facts of injury and their consequences should be alleged to admit their proof. They should be stated with as much reasonable certainty as their nature and character permit, so as to advise the opposite party what character of proof to expect, and what the extent of the injury and basis of damages

[8] Spicer v. Railroad Co., 149 Mass. 207, 21 N. E. 363. Under a count alleging that plaintiff was wrongfully expelled from defendant's street car by one of its servants, and that in consequence thereof, and of defendant's neglect of duty in not carrying her to her destination, and of her walk to her destination, she was made severely ill for a long time, plaintiff cannot recover any damages occasioned by the walk, since there is no allegation that the walk was rendered necessary by defendant's acts. But the allegation that she was wrongfully and forcibly expelled from the car is a clear averment of a tortious act by defendant, for the consequences of which it is responsible; and the count may be treated as if the allegation as to the walk were omitted, leaving the plaintiff to recover on this count for such damages as she shall show proceeded from her expulsion. Id.

[9] Alabama G. S. R. Co. v. Heddleston, 82 Ala. 218, 3 South. 53.

are. Particular acts of negligence, implied from a negligent act, need not be alleged when it is not in the power of the pleader to do so. Such facts are peculiarly within the knowledge of the defendant. But the facts of injury are known to, and should be set up by, the pleader.[1]

An allegation in the declaration that plaintiff "then and there became and was sick, lame, and disordered, and so remained for a long time, to wit," etc., is sufficient to authorize a recovery for permanent injuries.[2] Under an allegation that plaintiff was greatly injured and bruised, and that he suffered great anguish and pain, and became sick, sore, and lame, and was confined to his bed, and expended a large sum of money for doctors' bills and nursing, and that the injuries are permanent, plaintiff may give evidence of the nature and consequences of his injury, including the fact that a previous disease was aggravated thereby.[3] So an averment, after describing the injuries, that plaintiff became "wholly crippled and maimed, and prevented from actively pursuing his business for life," authorizes the admission of evidence that the injuries would

§ 444. [1] See, also, ante, § 434.

[2] Eagle Packet Co. v. Defries, 94 Ill. 598. It is not necessary to allege the permanency of the injury in the complaint in order to permit evidence of such permanency. Rosevelt v. Railway Co., 59 N. Y. Super. Ct. 197, 13 N. Y. Supp. 598, affirmed 133 N. Y. 537, 30 N. E. 1148; Lynch v. Railroad Co., 59 N. Y. Super. Ct. 71, 13 N. Y. Supp. 236, affirmed 128 N. Y. 681, 29 N. E. 149. In an action for personal injuries, plaintiff is entitled to damages to the time of trial, though he does not allege that his injuries are permanent. Carples v. Railroad Co. (Sup.) 44 N. Y. Supp. 670.

[3] Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297.

be deleterious to plaintiff's nerves, as well as to his general system, and that it would diminish his strength and power of physical endurance.[4] So, under a complaint stating the character of injuries received by plaintiff, and alleging that she was permanently injured, it is proper to give evidence of plaintiff's mental and physical condition.[5] In Texas, it has been held that general allegations that plaintiff was wounded and bruised, was greatly shocked, and injured in his head, chest, lungs, back, spine, and limbs, and had his nervous system greatly impaired, and thereby sustained serious external and internal injuries, will not support evidence of injuries of a special nature, e. g.

[4] Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85; Chicago, B. & Q. R. Co. v. Sullivan, 21 Ill. App. 580.

[5] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 423, 3 N. E. 389, 4 N. E. 908. In an action for injuries to plaintiff's hand, alleged to be permanent, evidence that the injury affected his general health is admissible. Hansee v. Railroad Co., 66 Hun, 384, 21 N. Y. Supp. 230. Under a general allegation that plaintiff was grievously bruised, hurt, and injured, he may prove any and all injuries which he received, and which were the natural consequences of defendant's wrongful act. Hence an amendment at the trial by adding the words, "and shoulder blade broken," does not change the issue, and is no ground for a continuance. Ohio & M. Ry. Co. v. Selby, 47 Ind. 471, 497. An allegation that plaintiff has received personal injuries in his spine, "chest," head, and limbs is sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood vessels situated in the chest. Gulf, C. & S. F. Ry. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66. The impairment of the power of speech by a personal injury is an element of ordinary damage, and may be proved without being specially pleaded. Garbaczewski v. Railroad Co., 5 App. Div. 186, 39 N. Y. Supp. 33. An allegation that plaintiff suffered from a retroflexion of the womb does not vary materially from proof of an antiflexion. Missouri, K. & T. Ry. Co. v. Turley (Indian Ter.) 37 S. W. 52

impaired capacity for sexual intercourse.[6] But in Illinois similar allegations have been held broad enough to include injuries to the internal reproductive organs, and as sufficient to admit evidence that said injuries had produced permanent sterility or incapacity to perform the sexual duties incident to the marriage state.[7] An allegation of injuries to the spine does not authorize recovery for impairment of vision resulting from concussion of the spine. Such damage should be specially pleaded.[8] So, under an allegation that plaintiff's head was cut to the skull, above the right eye, evidence of injury to the eye itself, producing blindness, is not admissible.[9]

With respect to loss of earnings, the supreme court of Illinois has recently said: "The rule deducible from the cases in this state is that, in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment

[6] Missouri, K. & T. Ry. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769; Campbell v. Cook, 86 Tex. 632, 26 S. W. 486.

[7] Lake Shore & M. S. Ry. Co. v. Ward, 135 Ill. 511, 26 N. E. 520. Where the fact, nature, and extent of plaintiff's injuries are controverted by defendant, it is competent for plaintiff to prove that she had always enjoyed good health up to the time of the accident, that her physical organs had theretofore discharged their functions naturally and regularly, and she may detail the nature of the accident, and state that thereafter she suffered great pain, could never sleep without taking medicine to quiet her, could not take any extended walks, and that her menstruation had been irregular ever since the accident. Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722.

[8] International & G. N. R. Co. v. Thompson (Tex. Civ. App.) 37 S. W. 24.

[9] Gulf, C. & S. F. R. Co. v. Warlick (Indian Ter.) 35 S. W. 235.

of such inability caused by the injury, and consequent loss and damages, and that proof of his particular employment or business, and of his ordinary wages and earnings therein, is admissible in evidence under such general averment, but that, when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration. The distinction we have noted may be a relaxation of the common-law rule, but it is founded upon the precedents to be found in our Reports." [10] Thus, under an averment in the petition that, by reason of said wounds and hurts, plaintiff "has been deprived of the means of support," there may be recovery for loss of wages during the time of disability. The averment that plaintiff has been deprived of the means of support includes the less comprehensive one that the injuries rendered him unable to pursue his occupation.[11] But under an allegation that, by reason of his injuries, plaintiff was precluded from attending to his

[10] Chicago & E. R. Co. v. Meech (Ill. Sup.) 45 N. E. 290, affirming 59 Ill. App. 69.

[11] Smith v. Railroad Co., 119 Mo. 246, 23 S. W. 784. Under an allegation that plaintiff "has become disabled for life to such an extent as to seriously interfere with the prosecution of his business," plaintiff may show, as special damages, loss in his business resulting from his injuries sued for. Frobisher v. Transportation Co., 81 Hun, 544, 30 N. Y. Supp. 1099. Where the declaration alleges that plaintiff's left thigh was dislocated and fractured, and that he was otherwise injured, and the evidence shows the character and extent of the injury, loss of time is so far established that the jury may properly take it into consideration in estimating damages, though neither the declara-

business, and thereby lost profits, he cannot prove that, at the time of the injury, he was receiving a compensation of $3,000 per annum for his services as a traveling salesman. The declaration must allege such a special contract in order to let in evidence thereof.[12]

Damages for mental suffering may be recovered as incidental to physical pain, though the mental suffering is not pleaded.[13] Under a general allegation that plaintiff was "greatly injured, cut, bruised, and wounded, internally and externally, about his hip and spine," evidence is admissible that he suffered both physical and mental pain.[14] But, in an action for ejection, evi-

tion nor the evidence shows the exact number of days lost by plaintiff. Chicago City Ry. Co. v. Hastings, 136 Ill. 251, 26 N. E. 594. Under a compaint alleging that plaintiff was compelled to remain away from his business for about six weeks because of his injuries, he is entitled to show his loss of earnings during this period. Carples v. Railroad Co. (Sup.) 44 N. Y. Supp. 670.

[12] Wabash W. Ry. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, and 34 N. E. 1111. But under an allegation in a complaint for personal injuries that plaintiff was disabled from his labor, and suffered a loss of power to labor, it is competent to show what wages he earned before the injury and what afterwards. Miller v. Railway Co., 73 Hun, 512, 26 N. Y. Supp. 162. Under an allegation that plaintiff was a skillful carpenter, that his injuries necessarily impaired his ability to labor, and were permanent, evidence as to his rate of earnings prior to the injury is admissible, though not specifically alleged. Christie v. Railroad Co. (Tex. Civ. App.) 39 S. W. 638.

[13] Caldwell v. Railroad Co., 7 Misc. Rep. 67, 27 N. Y. Supp. 397.

[14] Texas & P. Ry. Co. v. Curry, 64 Tex. 85. The court said: "The law infers, when such injuries to the person are shown to have existed as are alleged and proved in this case, that physical pain resulted therefrom; for by common observation we know that, in the ordinary operations of natural laws, pain is a necessary result of such injuries, unless the condition of the injured person is abnormal, which will not be presumed. This is equally true as to mental suffering; for it is

dence as to mental suffering is not admissible if not pleaded.[15] So, a general allegation in a petition that plaintiff's expulsion from a train caused him mental distress is not sufficient to authorize the admission of evidence that he suffered anxiety about a sick child, on whose account he desired to reach home as soon as possible.[16]

§ 445. SAME—DEFENDANT'S PLEADINGS.

At common law, in an action on the case, the plea of the general issue enabled defendant, not only to contest the truth of the facts alleged in the declaration, but to give in evidence anything which would, in equity and conscience, under existing circumstances, preclude plaintiff from recovering.[1] But, under the general denial of the Code, evidence of a distinct affirm-

contrary to common experience and the laws of man's existence and nature that any sane, healthy, and robust person, by physical injuries, may be made a cripple for life in a matter affecting his health, comfort, or capacity, without mental pain resulting from the changed condition."

15 Indianapolis, B. & W. R. Co. v. Milligan, 50 Ind. 392.

16 Gulf, C. & S. F. Ry. Co. v. Hurley, 74 Tex. 593, 12 S. W. 226. Special damages, such as sickness and disappointment caused by the failure of a train to stop at a signal station, and take on a passenger, must be averred in the declaration to be made the basis of a recovery. Illinois Cent. R. Co. v. Siddons, 53 Ill. App. 607. In an action for the ejection of a passenger, an allegation of special damages for expenses incurred "for telegrams necessary to inform his family and business associates of his whereabouts," does not authorize proof that plaintiff had by telegram requested his brother to attend to a matter of business for him. Alabama G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236.

§ 445. 1 1 Chit. Pl. 490, 491.

ative defense is not admissible, and the only evidence which defendant is entitled to give under this plea is limited to a contradiction of plaintiff's proof, and to the disproval of the case made by him.[2]

In an action for personal injuries, where the petition alleges that they were caused by the negligence of defendant's servants, it is competent for defendant, under the plea of the general denial, to show that the servants operating the train when the injuries occurred were not its servants, but of a receiver operating the road under the decree of a court of competent jurisdiction.[3] So, where the petition alleges that the conductor "compelled" plaintiff to jump from a moving train, defendant may prove, under a general denial, that plaintiff voluntarily jumped off.[4] So, in an action for the ejection of a colored woman from the ladies' room at a station, and compelling her to go into the room set apart for men, defendant may prove, under the general denial, that the room from which plaintiff was expelled was not the "ladies' room," but the room for "whites," and that the other was not the room for "males," but for blacks of both sexes.[5]

But an allegation, in the petition, of infancy and the appointment of a next friend, is not put in issue by a general denial, and a failure of proof as to these allegations is not fatal after a verdict in plaintiff's favor.[6] So,

[2] Pom. Rem. § 660.

[3] Kansas & G. S. L. Ry. Co. v. Dorough, 72 Tex. 108, 10 S. W. 711.

[4] St. Clair v. Railway Co., 29 Mo. App. 76.

[5] Smith v. Chamberlain, 38 S. C. 529, 17 S. E. 371.

[6] Randolph v. Railway Co., 18 Mo. App. 609.

the regulations of a railroad company must be pleaded to be admissible in evidence as a justification for an assault on a passenger by the conductor,[7] or for failure to stop the train at plaintiff's destination.[8]

Where the answer sets up particular acts as contributory negligence, evidence as to other acts of contributory negligence is properly excluded.[9]

§ 446. SAME—WAIVER OF OBJECTIONS.

An objection that testimony is not admissible under the pleadings should be taken when the testimony is offered, or it is waived.[1] To enable a party to raise the question on appeal, it must appear that he has taken proper objections at the trial. Where no objection is made to the introduction of the evidence in the trial court, and no question of variance is raised by motion to exclude or strike out the testimony or otherwise, the question cannot be raised for the first time on appeal.[2]

[7] Pier v. Finch, 29 Barb. (N. Y.) 170.

[8] Hicks v. Railroad Co., 68 Mo. 329. Matter in abatement of a personal injury suit, based on a champertous contract between plaintiff and his attorney, must be pleaded to be available, and, unless pleaded, evidence tending to establish such contract is not admissible. Allison v. Railroad Co., 42 Iowa, 274.

[9] Atchison, T. & S. F. R. Co. v. Dickey, 1 Kan. App. 770, 41 Pac. 1070.

§ 446. [1] Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578, affirming 48 Ill. App. 41; Mellor v. Railway Co., 105 Mo. 455, 16 S. W. 849; Shenandoah Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. 796.

[2] Chicago, B. & Q. R. Co. v. Dickson, 143 Ill. 368, 32 N. E. 380; Id., 42 Ill. App. 363.

CHAPTER XXXIII.

EVIDENCE—COMPETENCY, RELEVANCY, AND MATERIALITY.

§ 447. Knowledge of Defects or Incompetency.
448. Custom and Usage.
449. Other Acts of Negligence.
450. Other Accidents.
451. Other Defects.
452. Subsequent Precautions and Repairs.
453. Declarations against Interest.
454. Same—By Agents or Employés.
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458. Real or Demonstrative Evidence.
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462. Miscellaneous Decisions—Negligence and Contributory Negligence.
463. Same—In Actions for Ejection and Wrongful Arrest.
464. Same—As to Damages and Injuries.
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466. Same—As to Injuries and Damages.
467. Expert Evidence.
468. Same—On What Subjects Competent.
469. Same—Medical Experts.
470. Same—Medical Opinions Based on Statements Made out of Court.
471. Same—Examination of Experts.
472. Privileged Communications.

There are no rules touching the admissibility of evidence that are peculiar to actions against carriers for injuries to passengers, or for breach of any of their duties towards passengers. But, in view of the fact

that no text-book treats the subject exhaustively, it has seemed desirable to state with some fullness rules of evidence announced by the courts in deciding cases involving the rights of carrier and passenger.

§ 447. KNOWLEDGE OF DEFECTS OR INCOMPETENCY.

On the question of negligence, it is competent for plaintiff to show that defendant had knowledge of the unsafe condition of its means of transportation, or of the incompetency of its servants, though plaintiff is not bound to prove such knowledge. Thus, evidence that, prior to the accident sued for, the attention of a steamboat owner's servants and agents was called to the unsecure condition of a gangway used by passengers to board the boat is competent.[1] So, in an action for in-

§ 447. [1] Parker v. Steamboat Co., 109 Mass. 449. Where a passenger on a steamer is injured by being struck by a small boat, which fell from its fastenings while occupied by other passengers, evidence that passengers had been in the habit of sitting in it so frequently that the officers of the steamer must have known of it is admissible on the question whether they took proper precautions to prevent any danger which might reasonably be anticipated from such occupation. Simmons v. Steamboat Co., 97 Mass. 361. On the question as to the admissibility of evidence that the master had knowledge of the servant's incompetency, the authorities are in conflict. Evidence as to the employment of incompetent servants was held admissible in Bigley v. Williams, 80 Pa. St. 107; Pennsylvania R. Co. v. Books, 57 Pa. St. 339. But, on the other hand, it has been held that, in view of the fact that the master is responsible for the negligence of the servant under the rule respondeat superior, evidence of knowledge of incompetency on the part of the master is immaterial and irrelevant. Warner v. Railroad Co., 44 N. Y. 465; Cunningham v. Railway Co. (Cal.) 47 Pac. 452.

juries to a passenger on a stagecoach, caused by the shying of one of the horses, evidence as to prior acts of viciousness on the part of this horse is admissible to show its character and defendant's knowledge thereof.[2] So, evidence as to the general reputation of a street-car horse, among the drivers and employés of the company, as unsafe and unreliable, is admissible, as showing the negligence of the company in providing such an animal, and using it after the company knew or should have known the unfitness of the horse for the work.[3] In an action for injuries to a passenger on a street car caused by the breaking of a trolley wire, evidence that the wire had been the subject of frequently recurring accidents is admissible to show that the company had notice of its unsafe condition.[4] In an action against a railroad company for personal injuries, after it is shown that the accident was caused by the negligence of a switchman, and that he was intoxicated at the time, evidence that he was a man of intemperate habits, and that this was known to the officers of the company having the power to employ and discharge subordinates, is competent to show gross negligence on the part of the company, with a view of claiming exemplary damages.[5]

[2] Kennon v. Gilmer, 5 Mont. 257, 5 Pac. 847, affirmed 131 U. S. 22, 9 Sup. Ct. 696.

[3] Wormsdorf v. Railway Co., 75 Mich. 472, 42 N. W. 1000. But evidence of general knowledge and rumor among the employés of a street-railway company that a car had been on the road ever since it was built is hearsay and irrelevant. Id.

[4] Richmond Railway & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388.

[5] Cleghorn v. Railroad Co., 56 N. Y. 44. So, in an action by a passenger against the owner of a steamboat for injuries caused by negli-

Evidence that defendants were cautioned by a skilled mechanic, who had repaired their elevator, that they were running it carelessly, is competent and material to show a knowledge by defendants that they were operating it incautiously and carelessly.[6]

§ 448. CUSTOM AND USAGE.

A custom cannot justify the doing of an act clearly negligent, nor can a custom render that negligent which is clearly not so.[1] But, where the quality of the act in respect of its being negligent or otherwise is not obvious, it is always proper to consider what other persons of ordinary prudence, who are engaged in the same calling, under like circumstances, are in the habit of doing or ordinarily do. This is the universal test of negligence.[2] Thus, where it is claimed that a drover accompanying stock is guilty of negligence in walking along on top of a cattle train, evidence that such is the custom of stockmen is admissible, both for the purpose of rebutting the charge of contributory negligence, and

gence or unskillfulness of the engineer, defendant may prove, not as affecting compensatory, but as affecting punitive, damages, that the engineer, though unlicensed, was a skillful one. Fay v. Davidson, 13 Minn. 523 (Gil. 491). But testimony of the president of a street-car company, as to the degree of care exercised before the injury in the selection of drivers for its horse cars, is not material to the question whether the driver was negligent at the time of the injury. Augusta & S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706.

[6] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

§ 448. [1] Black, Acc. Cas. §§ 37, 38.

[2] Chicago, M. & St. P. Ry. Co. v. Carpenter, 5 C. C. A. 551, 56 Fed. 451.

for the purpose of showing that railroad companies permit stockmen to pass over the tops of freight trains on the running boards provided for that purpose, when the vicissitudes of the journey render it necessary to do so to reach their stock and attend to it, and to return to the caboose.[3]

Where negligent defective construction is charged, testimony is admissible to show that structures of a similar nature are or are not generally constructed in a similar manner. Hence, in an action for injuries sustained in falling from the unguarded end of defendant's elevated railroad station platform while looking for a urinal, plaintiff may show that on all other elevated railroads the exposed ends of platforms are guarded in some way, and that urinals are in use on such roads.[4]

In an action for injuries received in alighting from a train within the limits of a station, but not at a point where passengers were expected to leave, evidence of the usage of the road that one train should not enter the station while another train is engaged in receiving

[3] Id. Evidence of a custom of a railroad company to carry drovers through its yards on its engines and cars containing stock is admissible to show the authority of defendant's servants to thus carry deceased, and to show that, at the time of the accident, he was a passenger. Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 162, 180, 14 N. E. 197.

[4] Jarvis v. Railroad Co. (City Ct. Brook.) 16 N. Y. Supp. 96, affirmed 133 N. Y. 623, 30 N. E. 1150. But, in an action for personal injuries received in alighting from a train, the mere fact that the platform where plaintiff alighted was higher than that at another station of the road is immaterial. Nichols v. Railway Co., 68 Iowa, 732, 28 N. W. 44.

and discharging passengers there is admissible for the railroad company to show that its train hands managed the train in a proper manner.[5] In an action for personal injuries sustained because of defendant's alleged failure to afford plaintiff a reasonable opportunity to alight, evidence as to the customary length of stop of the train at that station is admissible against defendant to show what it had considered a reasonable time.[6]

Evidence of a custom or habit may also be admissible to corroborate or to contradict the testimony of a witness as to the existence of some fact, on the theory that what had theretofore usually been done was also done at the time in question. Thus, in an action for injuries sustained in alighting from a train at a point 100 feet from the station building, evidence that it was customary for the train to stop at that point is admissible to support plaintiff's testimony that the train was stationary when she attempted to alight, and to contradict defendant's that it made no stop until it reached the station building.[7] So, in such a case, where defendant puts in evidence that at the time of the injury the train was stopped as long or longer than usual, plaintiff may show in rebuttal that about the time of the injury defendant's trains frequently passed that

[5] Floytrup v. Railroad, 163 Mass. 152, 39 N. E. 797.

[6] Fuller v. Railroad Co., 21 Conn. 557. So, in such a case, evidence is competent as to the length of time that the train actually stopped, and also as to the average length of time for stops at such station by passenger trains. Chesapeake & O. Ry. Co. v. Reeves' Adm'r (Ky.) 11 S. W. 466.

[7] Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289.

station without stopping a sufficient length of time to enable passengers to alight.[8]

But evidence as to the existence of a custom in doing a particular act is not admissible, in the absence of independent testimony that the act was done at the time in question. Thus, in an action for personal injuries alleged to have been sustained by falling over a stool while passing from one car to another at a station, evidence that it was the custom of the company to leave the stool on the station platform to assist lady passengers to enter the train is not admissible on behalf of the company to show that the stool was not on the car, without some affirmative evidence on its part that the stool was in its place at the time of the accident.[9]

[8] Gulf, C. & S. F. Ry. Co. v. Rowland, 82 Tex. 166, 18 S. W. 96. In an action for personal injuries it was a material question whether a gas burner in the rear of defendant's station was lighted at the time of the accident. Two of defendant's witnesses testified that it was, but on cross-examination they admitted that they had no memory of that particular night, and that they knew it was lighted because the uniform custom before, at, and after the time of the accident was to light the burner every night. Held, that plaintiff might contradict this evidence by showing that, after the accident, this burner was often unlighted in the evening. Wentworth v. Railroad Co., 143 Mass. 248, 9 N. E. 563. In an action for personal injuries alleged to have been caused by the intoxication of the train hands, evidence that the engineer was in the habit of drinking is admissible, in connection with evidence that he had been drinking intoxicating liquor within 30 minutes of the time the accident occurred. Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860. But in an action for personal injuries, where the defense is that plaintiff was intoxicated at the time of the accident, evidence that he was in the habit of becoming intoxicated two or three years before the accident is inadmissible. Kingston v. Railway Co. (Mich.) 70 N. W. 315.

[9] Hardeman v. English, 79 Ga. 387, 5 S. E. 70; Mayfield v. Railroad Co., 87 Ga. 374, 13 S. E. 459.

§ 449. OTHER ACTS OF NEGLIGENCE.

Where the issue is whether A. did a particular thing, it is generally inadmissible to put in evidence the fact that he did a similar thing at some other time. To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare. Hence, where the issue is as to whether plaintiff attempted to jump on a moving train when he was injured, evidence that he had been in the habit of jumping on moving trains at that place, and had been warned of the danger, is not competent.[1] So, in an action for injuries to a passenger caused by the alleged negligence of defendant's employés, it is not competent to show similar acts of negligence by the same employés at other times and places than the one in question. The evidence of negligence must be confined to the time of the injury.[2]

The supreme court of California has, however, reached a different conclusion on this question. It has held that where the issue is whether or not plaintiff has

§ 449. [1] Louisville & N. R. Co. v. Berry, 88 Ky. 222, 10 S. W. 472; Eppendorf v. Railroad Co., 69 N. Y. 195.

[2] Southern R. Co. v. Kendrick, 40 Miss. 374. Where the issue is whether the driver of a street car suddenly stopped it while going at full speed, evidence of similar negligent acts of the driver at other times is not admissible. Maguire v. Railroad Co., 115 Mass. 239. In an action for the killing of a passenger on a street car in a collision with a train at a crossing, evidence that the driver of the street car had been guilty of other and previous acts of negligence, at times and places near the time and place of the act complained of, is inadmissible to prove his negligence on that particular occasion. Railway Co. v. Harrell, 58 Ark. 454, 25 S. W. 117.

been guilty of contributory negligence in jumping from a moving train, and the direct evidence is conflicting on this point, evidence that within a year before the accident plaintiff had frequently jumped off the cars while in motion, and had been warned against the danger of so doing, is admissible.[3]

§ 450. OTHER ACCIDENTS.

Proof of the happening of a prior accident in the same place has frequently been held competent, upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to

[3] Craven v. Railroad Co., 72 Cal. 345, 13 Pac. 878. The court said: "There is no doubt of the general rule applicable to criminal cases, that, on the trial of a defendant for a particular crime charged, evidence of the commission of other crimes cannot be introduced. The same rule seems to apply in civil cases, where it is sought to show that some specific act was done maliciously, or that it was done intentionally with some definite purpose, and not carelessly, from mere force of habit. But when, in the absence of any question of evil intent, or of any intent at all, the point of fact to be determined is whether or not a person did a particular thing, or did it in a particular way, and the direct evidence as to the fact is conflicting, then evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. A sensible man, called upon out of court to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner." In Fuller v. Railway Co., 75 Hun, 273, 26 N. Y. Supp. 1078, it was held that, in an action for injuries received while boarding a street car, caused by its sudden starting, plaintiff may testify that the driver suddenly started the car while she attempted to leave it, as bearing on his competency.

be unsafe and dangerous.[1] Thus, in an action for injuries sustained by a passenger in falling in the nighttime from a station platform, three feet above the ground, evidence that two other persons had fallen from the platform at the same point, under similar circumstances, is competent to show that the place was unsafe and dangerous.[2] So, in an action for injuries sustained in the derailment of a car, evidence is admissible to show that other trains had run off the track at or about the same place within a short time before the accident complained of.[3] So, in an action for injuries to a passenger in alighting from a rear car which had not been drawn up to the depot platform, evidence that other passengers had been injured in leaving the train at the same place is admissible to show negligence in not providing a longer platform, as well as on the question whether passengers left the train at this place with the knowledge and permission of defendant.[4] So, where defendant claims that plaintiff jumped from a moving street car, while plaintiff contends that he was thrown therefrom by reason of its coming to a sudden stop, evidence that another person was thrown from

§ 450. 1 Brady v. Railroad Co., 127 N. Y. 46, 27 N. E. 368, reversing 6 N. Y. Supp. 533.

2 Missouri Pac. Ry. Co. v. Neiswanger, 41 Kan. 621, 21 Pac. 582.

3 Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15, 49 Ala. 305; Brooklyn St. R. Co. v. Kelley, 6 Ohio Cir. Ct. R. 155.

4 Bullard v. Railroad, 64 N. H. 27, 5 Atl. 838. In an action for personal injuries caused by plaintiff's slipping between the car step and a platform while alighting from a street car, evidence that other persons had been injured by slipping or falling between a car step and the same platform is admissible. Rogers v. Trustees of New York & Brooklyn Bridge (Sup.) 42 N. Y. Supp. 1046.

the car at the same time as plaintiff is relevant to the issue.[5] But, in an action for injuries to a passenger in alighting caused by the starting of the train, it is not competent for plaintiff to prove that another passenger on another day fell while alighting from the train because it failed to stop a reasonable time. Such evidence is within the general rule that similar or the habitual conduct of defendant is not admissible to show the existence or absence of negligence in a given case.[6]

Evidence of accidents occurring after the one sued for, by reason of a defective structure, is not admissible. Such evidence could be competent only for the purpose of showing that by experience defendant had learned that the structure was insufficient, and still maintained it in that defective condition.[7] So, evidence of the occurrence of similar accidents at a place other than the one in question is inadmissible, in the absence of evidence that the conditions of the two places were similar.[8]

Evidence of the nonoccurrence of a similar accident to the one in suit may also be admissible on the question of the carrier's negligence. In Georgia, it has

5 Fogel v. Railway Co. (Cal.) 42 Pac. 565.

6 Gulf, C. & S. F. Ry. Co. v. Rowland, 82 Tex. 166, 18 S. W. 96. In an action for the death of a passenger who, in the nighttime, stepped from a ferryboat, the chain guard and barriers across the bow of which were down, evidence that similar accidents occurred at the same place, under similar circumstances, is not admissible. Davis v. Railroad Co., 8 Or. 172.

7 Johnson v. Railway Co., 52 Hun, 111, 4 N. Y. Supp. 848.

8 Brady v. Railroad Co., 127 N. Y. 46, 27 N. E. 368, reversing 6 N. Y. Supp. 533.

been held that in an action for injuries to a passenger's eye, which was struck by a spark or cinder emitted from the locomotive, evidence that no similar accident had ever been heard of before or since is admissible, since a carrier of passengers is not obliged to foresee and provide against accidents which have not been known to occur before, and which may not reasonably be expected.[9]

§ 451. OTHER DEFECTS.

By the weight of authority, in an action for injuries to a passenger in a railroad wreck, alleged to have resulted from defendant's negligence in allowing the track to be out of repair, evidence as to the general bad condition of the track in the immediate vicinity of the accident is competent, and plaintiff need not confine himself to the exact point of derailment.[1] "Evidence as to the condition of the track need not necessarily be confined to the precise spot of the accident; but it is within the discretion of the trial court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long been bad, and that the rails had been

[9] Higgins v. Railroad, 73 Ga. 149. See, also, ante, § 12, as to unforeseen accidents.

§ 451. [1] Ohio Val. Ry. Co. v. Watson's Adm'r, 93 Ky. 654, 21 S. W. 244; Union Pac. Ry. Co. v. Hand, 7 Kan. 238; Texas & P. Ry. Co. v. De Milley, 60 Tex. 194; Missouri Pac. Ry. Co. v. Collier, 62 Tex. 318; Texas Trunk Ry. Co. v. Johnson, 86 Tex. 421, 25 S. W. 417; Nashville, C. & St. L. R. Co. v. Johnson, 15 Lea (Tenn.) 677; Murphy v. Railroad Co., 66 Barb. (N. Y.) 125. But testimony as to the condition of the track a mile and a half from the place of the accident is too remote. Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. 701.

in use for a great many years. Such evidence has some tendency to prove both that a worn-out rail was the cause of the accident, and that defendant had neglected to repair the defect." [2] Thus, in an action for personal injuries sustained in the derailment of a train, caused by the giving way of a rail in consequence of the defective condition of the ties, evidence that other rails and ties in the vicinity of the accident were old and rotten is competent, as affording a stronger inference that defendant's employés knew of the perilous condition of the track.[3] So, in an action against a railroad company for injuries sustained by the fall of a bridge over which the train was passing, where the stability of the whole structure is involved in the charge of negligence in the complaint, it is competent to give evidence of the condition, at the time of the accident, of portions of the bridge left standing and not immediately involved in the wreck; the entire bridge having been built at the same time, and subject to the same agencies of decay.[4] So, where plaintiff's case proceeds on the theory that he was injured by the rapid running of his train over an imperfect track, it is competent for him to show the condition of the track over which the train had to pass before it was derailed.[5] So, in an action for injuries sustained in the derailment of a car owing to the breaking of a rail, evidence is competent that the broken rail had been put down in place of another which had broken on the morning of the acci-

[2] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1.

[3] Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722.

[4] Leonard v. Southern Pac. Co., 21 Or. 555, 28 Pac. 887.

[5] Jacksonville S. E. Ry. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093.

dent at exactly the same place. The fact that a number of rails had broken in quick succession at the same place invites attention to that place, and also raises an inference that the roadway was defective.[6]

The authorities on this subject are not, however, uniform. Several courts have held that, in an action for injuries to a passenger caused by a defective track, it is error to admit evidence of other defects in the track not in the same vicinity, and which could not have contributed to the accident.[7] In an action for injuries caused by a train leaving the track at a switch, evidence as to the condition of the roadbed at places other than the place of the accident is incompetent.[8]

As a general rule, evidence of defects in a railroad track five or six months after a personal injury is not admissible; but, when connected with other proof showing that the condition of the track remained substantially the same, such evidence may be received as tending to show the condition at the time of the injury, the court limiting the same for that purpose.[9] So, evidence as to the defective condition of the track a month before the accident is admissible, when followed by evidence that the condition remained the same up

[6] Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 276, 3 N. E. 836.

[7] Stewart v. Everts, 76 Wis. 35, 44 N. W. 1092; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537; Missouri Pac. Ry. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810; Pattee v. Railway Co., 5 Dak. 267, 38 N. W. 435.

[8] Grant v. Railroad Co., 108 N. C. 462, 13 S. E. 209.

[9] Jacksonville S. E. Ry. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093.

to the time of the accident.[10] So, where, shortly after the derailment of a train, old ties were replaced by new ones, a witness who examined the old ties shortly after their replacement may testify as to their condition.[11]

§ 452. SUBSEQUENT PRECAUTIONS AND REPAIRS.

The alteration and repair of a machine, after it has caused injury, is not competent evidence of negligence in its construction.[1] The reason for this rule is thus stated by the supreme court of Illinois:[2] "Evidence of precautions after an accident is apt to be interpreted by a jury as an admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it. New measures and new devices adopted after an accident do not necessarily imply that all previous devices or measures were insufficient. * * * Persons to whose negligence accidents may be at-

[10] Union Pac. Ry. Co. v. Hand, 7 Kan. 380.

[11] Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960, affirming 48 Ill. App. 274.

§ 452. [1] Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591; Morse v. Railway Co., 30 Minn. 465, 16 N. W. 358; Corcoran v. Peekskill, 108 N. Y. 151, 15 N. E. 309; Nalley v. Carpet Co., 51 Conn. 524; Dougan v. Transportation Co., 56 N. Y. 1, affirming 6 Lans. (N. Y.) 430. In some states a contrary view prevails, and such evidence is admissible to show negligence. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; McKee v. Bidwell, 74 Pa. St. 218, 225; St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 468; Augusta & S. R. Co. v. Renz, 55 Ga. 126; Baldwin v. Navigation Co., 4 Daly (N. Y.) 314.

[2] Hodges v. Percival, 132 Ill. 53, 23 N. E. 423. In this case it was held that the adoption of a new device, after an accident, by the operator of a passenger elevator, is not admissible against him.

tributed will hesitate about adopting such changes as will prevent the recurrence of similar accidents, if they are to be charged with an admission of their responsibility for the past. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not necessarily to be regarded as tantamount to a confession of past neglect." It has accordingly been held that evidence as to repairs of a railroad track after an accident alleged to have been caused by defects therein is not admissible;[3] nor is evidence that, after an accident on a wooden bridge, it was replaced by one of iron.[4]

But evidence of the repair of a track at the place where an accident had occurred is admissible to rebut evidence of defendant's witnesses that the track had been used, after the accident, without being repaired.[5]

[3] Reed v. Railroad Co., 45 N. Y. 574, reversing 56 Barb. (N. Y.) 493; Hipsley v. Railroad Co., 88 Mo. 348; Texas Trunk Ry. Co. v. Ayres, 83 Tex. 268, 18 S. W. 684; Fordyce v. Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

[4] Dale v. Railroad Co., 73 N. Y. 468; San Antonio & A. P. Ry. Co. v. Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252. In an action for personal injuries caused by the giving way of a railroad bridge while a passenger train was going over it, evidence is not admissible that in the reconstruction of the bridge longitudinal braces were used where none had been used before. Isaacs v. Southern Pac. Co., 49 Fed. 797.

[5] Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766. So, while evidence of additional precautions or subsequent repairs is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury occurred was under the control of the defendant, and he may require the court to restrict such evidence to its legitimate effect by proper instructions. Skottowe v. Railway Co., 22 Or. 430, 30 Pac. 222. But it

§ 453. DECLARATIONS AGAINST INTEREST.

Admissions or declarations relevant to any fact in issue are admissible as against the person by whom they are made.

Admissions or declarations by a party against his own interest are always admissible against him whenever made. Thus, an admission by a passenger, made several hours after the accident, that he alone was to blame for it, is admissible against him.[1] Such an admission is not, however, conclusive against him; but is subject to explanation at the trial, and the jury is to determine the weight to be given the admission as well as the sufficiency of the explanation.[2] So, where defendant introduces an affidavit signed by plaintiff showing the injury to have been due to his negligence, plaintiff may show that his statements were not correctly embodied in the affidavit, that it was not properly read to him, and that he signed it without reading it, under the belief that it was correct.[3]

would seem that the evidence could be competent for this purpose only when defendant denies the control.

§ 453. [1] Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981; De Mahy v. Steamship Co., 45 La. Ann. 1329, 14 South. 61. But a newspaper account of a railroad accident, containing declarations of the plaintiff, is not admissible in evidence in favor of defendant, where the author of the article is unable to state from whom he received his information. Downs v. Railroad Co., 47 N. Y. 83.

[2] Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Chicago & A. R. Co. v. Wilson, 63 Ill. 167; Zemp v. Railroad Co., 9 Rich. (S. C.) 84.

[3] Chicago City Ry. Co. v. Hastings, 136 Ill. 251, 26 N. E. 594; Id., 35 Ill. App. 434.

§ 454. SAME—BY AGENTS OR EMPLOYES.

Declarations or admissions made by an agent or employé are not admissible against his principal, unless they relate to a transaction in which the agent or employé had real or apparent authority to act for the principal, and unless they were made during that very transaction, and thus constituted a part of the res gestæ.

As a general rule, the declarations of an employé, with respect to the happening of an accident, made after its occurrence, are not admissible as evidence in chief against his employer. The employé himself may be called as a witness at the trial, and his statements out of court clearly fall within the rule against hearsay evidence. Of course, if he is called as a witness for his employer, it is always competent for the other party to impeach his testimony by showing that he has made contradictory statements out of court.[1]

The principles in the black-letter text have been frequently applied by the courts in actions by passengers against carriers. The declarations of a flagman, long after a collision between two trains, as to how far he had gone back to flag one of them, are inadmissible;[2] and so is the declaration of the conductor, after an accident, as to its cause.[3] A statement by a brakeman, after an injury to a passenger while attempting to board a train, that it should have stopped longer, re-

§ 454. [1] See post, § 498.

[2] Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[3] Chicago & N. W. Ry. Co. v. Fillmore, 57 Ill. 265.

lates to a past transaction, and is not admissible against the company.[4] So, in an action against a railroad company for requiring a passenger to pay a higher rate than the ticket fare, the declaration of the ticket agent that he was asleep before and on the arrival of the train on which plaintiff took passage is incompetent, where made the day following.[5]

The first essential requisite to render a declaration of an agent or employé admissible against his principal is that it must appear that he had real or apparent authority touching the subject-matter as to which the admission was made.[6] Thus, the declarations of the captain of a steamer, that the place where the passenger fell and was injured was dangerous, though made shortly after the accident, are not admissible against the owner of the steamer. The captain, being employed to navigate the steamer, cannot bind his employers as to its negligent construction.[7] So the declarations of a brakeman, as to the defective condition of a car, made after an accident, are not admissible against the company,

[4] Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

[5] Forsee v. Railroad Co., 63 Miss. 66.

[6] The declarations of agents and employés concerning matters as to which they have no authority to speak for the master, and not made in connection with the performance of any duty or the transaction of any business for the employer, are mere hearsay, and inadmissible against the employer. Missouri Pac. Ry. Co. v. Johnson, 55 Kan. 344, 40 Pac. 641. Agency cannot be proven merely by declarations out of court by the person whose agency is claimed. Id. The declarations of a brakeman, when ejecting a person from a train, are inadmissible to prove that he acted under orders from the conductor. The declarations of a party assuming to act for another are not admissible to prove agency. Lyons v. Railway Co. (Tex. Civ. App.) 36 S. W. 1007.

[7] American S. S. Co. v. Landreth, 102 Pa. St. 131.

unless it is shown to be his province to watch over and superintend the condition of the cars constituting the train.[8] But a conductor acts in the line of his duty when he warns a passenger, who expresses a fear of a fellow passenger, of the latter's insanity; and the conductor's statements are therefore admissible in evidence in an action for the killing of another passenger by the insane passenger, as showing the conductor's knowledge of the insanity.[9]

In the next place, it must appear that the declaration or admission was a part of the res gestæ of the subject-matter in issue.[10] On this subject the New York court of appeals [11] has well said: "The principal constitutes the agent his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business is the act of the principal whom he represents; and, when the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made at the same time, and constituting part of

[8] Wright v. Railroad Co., 34 Ga. 330. The declaration of the conductor at the time of an accident, as to what he had said to the company on a previous occasion about the safety of stools used by passengers in alighting, is no part of the res gestæ. Gulf, C. & S. F. Ry. Co. v. Southwick (Tex. Civ. App.) 30 S. W. 592.

[9] St. Louis, I. M. & S. Ry. Co. v. Greenthal, 23 C. C. A. 100, 77 Fed. 150.

[10] Neither the declarations nor admissions of an agent, made after the event to which they refer has transpired, can be received as evidence to bind his principal, unless they are so immediately connected therewith as to become a part of the res gestæ. Pittsburgh, C. & St. L. R. Co. v. Theobald, 51 Ind. 246; St. Louis, I. M. & S. Ry. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587.

[11] Anderson v. Railroad Co., 54 N. Y. 334.

the res gestæ. They are then in the nature of original evidence, and not hearsay, and are the ultimate fact to be proven, and not an admission of some other fact. They must be made, not only during the continuance of the agency, but in regard to the transaction depending at the very time." As to when a declaration is a part of the res gestæ, the supreme court of Alabama [12] has laid down the following rule: "The declaration must be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the earmarks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past."

In the following cases, declarations of the employés of carriers have been held not to be a part of the res gestæ, and not admissible against it, in actions brought by passengers: Declarations of the driver of a street car, as to how an accident happened, made half an

[12] Alabama G. S. R. Co. v. Hawk, 72 Ala. 112. "They must be undesigned incidents of the very act in controversy,—spontaneous emanations therefrom,—and must not have force independent thereof, or be dependent for their effect on the credibility of the person making them." Metropolitan R. Co. v. Collins, 1 App. D. C. 383. While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person competent against another as part of the res gestæ, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. Butler v. Railway Co., 143 N. Y. 417, 38 N. E. 454, reversing 4 Misc. Rep. 401, 24 N. Y. Supp. 142.

hour after its occurrence.[13] The declarations of a stage driver, immediately after the upsetting of the coach, showing that he was to blame for it.[14] A statement made by a conductor, after an accident, in conversation with a passenger, as to where he was at the time of the accident.[15] Declarations of the locomotive engineer as to the rate of speed when an accident occurred, made within 10 to 30 minutes thereafter.[16] The conversations of bystanders and declarations by the servants of a railroad company, narrating the cause and circumstances of the disaster, and made within an hour or two after the wreck.[17] Statements of a sec-

[13] Dietrich v. Railroad Co., 58 Md. 347.

[14] Ryan v. Gilmer, 2 Mont. 517.

[15] Jammison v. Railroad Co. (Va.) 23 S. E. 758.

[16] Vicksburg & M. R. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118. In this case the court said: "His declaration after the accident became a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles per hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries arose. It was in its essence the mere narration of a past occurrence, not a part of the res gestæ,—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the res gestæ simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it." The declaration of the engineer, made a few minutes after an injury to a passenger, that the bell had not been rung, is not admissible against the company. Alabama G. S. R. Co. v. Hawk, 72 Ala. 112.

[17] Missouri Pac. Ry. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346. Statements of section men, after the derailment of a car, that the place of

tion man six months after a wreck, caused by a broken rail, that he had hidden the broken piece of rail because there was a flaw in the end of it.[18] Where a passenger was injured while alighting from a street car, an admission by the conductor that it was his fault, made immediately after she struck the ground, when he came to her assistance.[19] Where a passenger was injured in getting on a street car by its sudden starting, a declaration of the transfer agent, made two or three minutes after the accident, that the conductor started the car without authority.[20] Where a passenger was injured while getting on a steamer, declarations of the captain, as to the cause of the accident, made to the

the accident is a dangerous one to work at, and a statement of the claim agent that the company was liable. Mobile & O. R. Co. v. Klein, 43 Ill. App. 63. Declarations of the president of a construction company which was building and equipping a railroad, made two or three hours after an accident, at another place, to a newspaper reporter, as to the cause of the accident. Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853.

[18] Anderson v. Railroad Co., 54 N. Y. 334.

[19] Williamson v. Railroad Co., 144 Mass. 148, 10 N. E. 790. The court said: "The declaration of defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred. * * * It did not accompany the principal act, * * * or tend in any way to elucidate it. It was only the expression of opinion about a past occurrence, and not part of the res gestæ. It was no more competent because made immediately after the accident than if made a week or a month afterwards." In an action for injuries sustained while alighting from a train, declarations of the conductor, as to the cause of the accident, made when the train is half way to the next station, are not admissible against the company. Chesapeake & O. Ry. Co. v. Reeves' Adm'r (Ky.) 11 S. W. 464.

[20] Metropolitan R. Co. v. Collins, 1 App. D. C. 383.

passenger two days later, during the journey.[21] A statement by the conductor, after he had accomplished the ejection of a passenger, and just as the train had again started, that he ought to have broken the passenger's neck.[22]

As illustrating what declarations are a part of the res gestæ, the following cases are cited: Where a passenger fell while alighting in the dark at an unsafe place, statements by the passenger and a brakeman who fell with her, made immediately after they had arisen from the fall.[23] Where a passenger got off after the train had started, the remark of the brakeman while assisting her to alight, "Come on; hurry up!" [24]

[21] Union Packet Co. v. Clough, 20 Wall. 528; Union Packet Co. v. Viles, 22 Lawy. Ed. 409.

[22] Barker v. Railway Co., 126 Mo. 143, 28 S. W. 866. A guard on an elevated train closed the gate, without looking, while a female passenger was getting on, striking her, and she made an exclamation of pain. Held, that an insulting remark then made by the guard was not admissible as part of the res gestæ. Butler v. Railway Co., 143 N. Y. 417, 38 N. E. 454, reversing 4 Misc. Rep. 401, 24 N. Y. Supp. 142. A passenger was ejected from the train at a station. He then paid his fare under protest, and continued his journey. Held, that evidence of slanderous and abusive epithets applied by the conductor to the passenger, long after the ejection, were not admissible against the company. Hamilton v. Railroad Co., 51 N. Y. 100. In an action against a street-railroad company for an assault on a passenger by a fellow passenger, statements of the conductor in regard to the occurrence, not made at the time of the act so as to constitute a part of the res gestæ, and being recitals of what the driver told him at the time of the event, are in the nature of hearsay evidence, and inadmissible. Hendricks v. Railroad Co., 44 N. Y. Super. Ct. 8.

[23] Louisville, N. A. & C. Ry. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

[24] Waller v. Railroad Co., 83 Mo. 608. Where a passenger is thrown overboard from a steamboat by a defect in the chain box, and is pulled

Where the servants of a steamboat company assaulted a passenger while removing him from one portion of the boat to another, declarations of one servant to the other while the removal was taking place.[25] The declarations of a ticket inspector, on examining a ticket presented by a passenger, that he rejected it on the ground that it was not presented by the original purchaser, are admissible as evidence that, not being objected to otherwise, it was genuine.[26] Where a passenger is expelled from a street car for alleged nonpayment of fare, and is then readmitted by the conductor, who has become convinced that he has made a mistake, statements of the conductor when he permitted the passenger to get on the car again are admissible as part of the res gestæ.[27]

The same principles apply to statements made before the happening of the accident. Thus statements made by a brakeman while ordering a trespasser off from a rapidly moving train, and immediately preceding the act of forcing him therefrom, are part of the res gestæ,—"verbal acts" accompanying the wrongful force complained of by plaintiff.[28] So, in an action

out of the water, and placed on the wharf, with his leg broken, evidence that the master of the vessel refused to let any of the crew assist him to a carriage is competent on the question of damages and as part of the res gestæ. Hall v. Steamboat Co., 13 Conn. 319. This decision would seem to be doubtful on principle.

[25] New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, affirming 18 Fed. 156. "They accompanied and explained the acts of the defendant's servants, out of which directly arose the injuries inflicted on plaintiff."

[26] Nichols v. Southern Pac. Co., 23 Or. 123, 31 Pac. 296.

[27] Robinson v. Railway Co. (Wis.) 68 N. W. 961.

[28] Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86.

for injuries to a passenger caused by the giving way of an embankment, the declarations of the civil engineer of the railroad company, made while actually engaged upon the work, and in respect to its proper construction, are part of the res gestæ, and are therefore admissible in evidence.[29] So, in an action by a passenger for being willfully drenched with water by a brakeman and conductor on the train in which he was carried, a declaration of the brakeman of his intention to do it is admissible.[30] But, in an action for injuries to a passenger caused by the sudden starting of the car while attempting to alight, declarations of the driver, made some time before the accident, showing that he was in a hurry and behind time, are not admissible. Just what the mental attitude of this driver was at any place on the road aside from where the accident occurred had no legitimate tendency to prove anything for which defendant would be liable.[31]

The admissibility of the declarations of the principal officers of railroad companies seems to rest on the same

[29] Brehm v. Railway Co., 34 Barb. (N. Y.) 256. In an action for injuries to a passenger in the derailment of a train, caused by the removal of the ties for the purpose of repairs, the declaration of the foreman in charge of the gang employed in relaying the ties, that there was sufficient time to relay them before the arrival of the next train, is admissible against the company as part of the res gestæ. Matteson v. Railroad Co., 62 Barb. (N. Y.) 364.

[30] Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19.

[31] Gardner v. Railway Co., 99 Mich. 182, 58 N. W. 49. In an action for personal injuries caused by the derailment of a train, declarations of the conductor, shortly before the accident, as to the bad condition of the road, and as to the train having run off the track on prior trips, are not part of the res gestæ, and not admissible against the company. Mobile & M. R. Co. v. Asheraft, 48 Ala. 15.

principles as those of minor agents and employés.[32] Thus the declarations of the superintendent of a railroad, as to the cause of an accident, are not admissible against the company. The board of directors alone has power to make admissions in regard to the controversy which would bind the company, and no ordinary agent possesses that power, unless expressly delegated.[33] So the declaration of the president of a street-railway company, that one of its drivers was discharged because a passenger had been thrown from his car, is not admissible against the company, in an action by the passenger for the injuries sustained, where the president was not present at and had no personal knowledge of the accident.[34]

§ 455. DECLARATIONS IN FAVOR OF PARTY MAKING THEM.

Declarations are never admissible in favor of the party making them, unless they form part of the res gestæ of the subject-matter in issue.

On the soundest principles of public policy, the unsworn statements of a party to an action, made out of court, are almost without exception excluded as evidence in his own favor. Only when such declarations constitute a part of the res gestæ of the transaction

[32] The admissibility of declarations of the officers of a corporation rests on the same principles as apply to agents of private persons. Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[33] Hill v. Railroad Co., 11 La. Ann. 292.

[34] Lombard & S. S. Pass. Ry. Co. v. Christian, 124 Pa. St. 114, 16 Atl. 628.

under investigation at the trial are they deemed competent.[1]

On the question of what declarations are deemed a part of the res gestæ, within this exception, there is some conflict of authority. The more rigid, and it is believed the better, rule is that, to be a part of the res gestæ, the declarations or exclamations uttered by the parties to a transaction must be contemporaneous with and accompany it, and must be calculated to throw light upon the motives and intention of the parties to it; and that declarations which are merely narrative of a past transaction are not admissible as part of the res gestæ.[2] On the other hand, some courts hold that the declaration, to be a part of the res gestæ, need not be

§ 455. [1] Possibly another exception exists, to wit, for the purpose of corroborating the testimony of a witness given at the trial; as, where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made a similar declaration at a time when the imputed motive did not exist. So, in contradiction of evidence tending to show that the account given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen. Robb v. Hackley, 23 Wend. (N. Y.) 50; In re Hesdra's Will, 119 N. Y. 618, 23 N. E. 555. In order to come within the above exceptions to the rule, it is not necessary that there be a direct charge of fabrication. It is sufficient if the impeaching evidence tends to show that the account of the transaction given by the witness is a recent fabrication or was prompted by corrupt motives, or where the object of the cross-examination is to show that the testimony of the witness is an afterthought and a subsequent invention. Gilbert v. Sage, 57 N. Y. 639, 640; Wray v. Fedderke, 43 N. Y. Super. Ct. 335, 340; Com. v. Wilson, 1 Gray (Mass.) 337, 340; Baber v. Railroad Co., 9 Misc. Rep. 20, 29 N. Y. Supp. 40.

[2] Waldele v. Railroad Co., 95 N. Y. 274, reversing 29 Hun (N. Y.) 35.

coincident in point of time with the main fact to be proved. It is enough that the two are so closely connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible.[3]

Applying the more rigid rule, it has been held, in an action for the ejection of a passenger, that plaintiff's declarations, immediately after the event, and after the train had gone, are not admissible as part of the res gestæ.[4] So, in an action for injuries to plaintiff's wife in alighting from a train, it is not competent for plaintiff to prove what the wife said immediately after the accident, and while being helped to her feet, as to its cause.[5] On the other hand, under the more liberal rule, declarations made under almost similar circumstances have been admitted. Thus, where a boy is thrown or falls from the front platform of a street car, his declarations, when first picked up, as to how he got

[3] Leahey v. Railway Co., 97 Mo. 165, 10 S. W. 58; Missouri Pac. Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039.

[4] Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. 508.

[5] Cleveland, C. & C. R. Co. v. Mara, 26 Ohio St. 185. In such a case, a statement by plaintiff, in the presence of the conductor, that he let her fall, is not admissible as part of the res gestæ. Such statement is not explanatory of an act then transpiring, but is a statement of an occurrence which has already happened. Chicago, B. & Q. R. Co. v. Johnson, 36 Ill. App. 564.

under the car, are admissible.[6] So, the declarations of a passenger injured while alighting from a train, as to how the accident happened, made to a person who ran to his assistance, and before his removal from the scene, are admissible.[7] So, declarations made by a person run over by a train, as to the cause of the accident, made at the place where it happened, and within a very few minutes after it occurred, and while plaintiff was still writhing under the pain inflicted by it, are admissible as part of the res gestæ.[8]

But declarations made, not only after the accident, but after the injured person has left the scene, are not admissible, even under the most liberal rule. Thus, in an action for a broken leg alleged to have been received while alighting from a train, declarations of plaintiff as to how he was injured, made after he had bound up the leg, crawled through a culvert from one side of the railroad track to the other, seated himself on the crossties, and cried for help, made to a person who reached him about half an hour after hearing his cries, are no part of the res gestæ, and, being the mere narrative of a past event, are not admissible in his own behalf.[9] So,

[6] Leahey v. Railway Co., 97 Mo. 165, 10 S. W. 58. But his declarations, as to how he got hurt, made after being carried into an adjoining house, and laid on a cot, within 5 to 20 minutes after the accident, are not admissible. Id.

[7] Missouri Pac. Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759.

[8] International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039.

[9] Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200. Code Ga. 1882, § 3773, adopts the more liberal rule heretofore stated, and provides that declarations accompanying an act, or so nearly con

in an action for ejection of a passenger, his declarations, made a few minutes afterwards, and several hundred feet from the place, as to its cause, are not admissible.[10]

In Maryland, it has been held that declarations of a person just before he is about to board a train, and before an accident in which he is killed, that he is about to go on a journey, are admissible as part of the res gestæ, and as showing that he was rightfully on the company's premises.[11] But in Missouri it has been held that, in an action for injuries sustained in being pushed from a moving train, where the defense is that plaintiff, in company with a number of other young men, got on the train at a station to see how far he could ride and jump therefrom in safety, and that he was hurt in so jumping, evidence as to plaintiff's declarations, before he got on the train, that he intended to become a passenger, are not admissible in his favor.[12] The supreme court of Illinois has likewise held that declarations by plaintiff's intestate as to her intention to become a passenger on defendant's train, made an hour before the time of departure, and while she is en-

nected therewith in time as to be free from all suspicion of device or afterthought, are admissible as part of the res gestæ. Declarations made by a passenger injured by a fall from a street car, made after she reached her home, 200 yards away, and had gone to the house of a sister-in-law across the street, as to how she got hurt, are not part of the res gestæ. Augusta & S. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674. A card published by passengers shortly after a railroad collision is no part of the res gestæ. Macon & W. R. Co. v. Johnson, 38 Ga. 409.

[10] Ohio & M. R. Co. v. Cullison, 40 Ill. App. 67.

[11] Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201.

[12] Preston v. Railroad Co., 132 Mo. 111, 33 S. W. 783.

gaged in her household duties, are not admissible as part of the res gestæ.[13]

The same principles apply when it is sought to put in evidence the statements of the company's servants, in its favor. Thus, a written statement by the conductor of a street car, in the line of his duty, giving details of the accident, made immediately after it happened, is not admissible in favor of the company, but the facts must be proved by the conductor, or others who witnessed the occurrence. But, if the conductor be sworn, he may use the written statement to refresh his memory.[14]

[13] Chicago & E. I. R. Co. v. Chancellor (Ill.) 46 N. E. 269, reversing 60 Ill. App. 525. The court said: "It can be stated as a general rule that anything said or done before the principal act occurred or was within the contemplation of the parties cannot be regarded as part of the res gestæ, although separated only by the least possible span of time, unless it tends to explain and unfold the principal act by the undesigned act or declaration of the party, for the reason that such declaration could not be said to throw any light upon the motives of the parties. A person desiring to commit suicide might, an hour before the act, declare that he intended to become a passenger upon a train, when, as a matter of fact, no such intention existed in his mind, but the only intention there existing might be to go to a passenger station, where trains were passing, to take his life. Such declaration, therefore, made an hour, or any other space of time, previous to the act of departure itself, would afford no light upon his intention, and could not be considered as evidence, unless immediately connected with the act of departure."

[14] North Hudson Co. R. Co. v. May, 48 N. J. Law, 401, 5 Atl. 276. In an action by a passenger against a railroad company for compelling her to get off before reaching her destination, on the ground that the train did not stop there, a statement by the conductor, shortly after he took up plaintiff's ticket, that the train did not stop at her destination, and that she would have to get off at the preceding station, is a declaration by the company's agent in its interest, and is not ad-

On the principle that declarations are not admissible in favor of the party making them, dying declarations are excluded as evidence in civil cases.[15]

§ 456. SAME—DECLARATIONS AND EXCLAMATIONS OF PAIN.

Although the injured person is a witness, and testifies at the trial, the exclamations of pain made by such person may be proved and used to corroborate other evidence, and to give a more particular and vivid description of his or her condition. If evidence of the exclamations which are the natural concomitants and signs of pain and suffering were excluded, in many cases a party testifying as a witness in his own behalf would be deprived of that corroboration of his evidence to which he is justly entitled.[1] Whenever it becomes

missible as evidence of the fact stated. Sira v. Railroad Co., 115 Mo. 127, 21 S. W. 905.

[15] East Tennessee, V. & G. R. R. v. Maloy, 77 Ga. 237, 2 S. E. 941; Marshall v. Railway Co., 48 Ill. 475; Friedman v. Railroad Co., 7 Phila. (Pa.) 203.

§ 456. [1] Hagenlocher v. Railroad Co., 99 N. Y. 136, 1 N. E. 536; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840; Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75; Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Cleveland, C., C. & St. L. Ry. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367; St. Louis & S. F. Ry. Co. v. Murray, 55 Ark. 248, 18 S. W. 50; Harris v. Railway Co., 76 Mich. 224, 42 N. W. 1111; Lacas v. Railway Co., 92 Mich. 412, 52 N. W. 745; Texas & P. Ry. Co. v. Barron, 78 Tex. 421, 14 S. W. 698; Houston & T. C. R. Co. v. Shafer, 54 Tex. 641. A statement by an injured person, immediately after an accident, "Take those splinters out of my leg!" is admissible under the rule making exclamations of pain competent. West v. Railway Co.

important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of an inquiry as to its severity, effect, or nature, expressions of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence, regardless of the person to whom made, though they are especially competent when made to a physician called in for treatment.[2]

But evidence as to the declarations of a sick person, as to the nature, symptoms, and effects of the malady under which he is laboring, when not made to a physician treating him professionally, should be confined to such expressions as furnish evidence of the condition of the patient at the time of the declaration, excluding carefully everything in the nature of a narrative of what is past.[3] Thus, what an injured person says about

(Super. N. Y.) 1 N. Y. Supp. 519, affirmed 121 N. Y 654, 24 N. E. 1092. Sometimes such declarations are admissible on the ground that they form a part of the res gestæ of the accident. Thus, in an action for injury sustained in the overturning of a stagecoach, a declaration of the passenger, uttered while his hand is still fast under the upturned coach, as to the nature of his injuries, is admissible as part of the res gestæ. Frink v. Coe, 4 G. Greene (Iowa) 555. So, in Texas, complaints of injuries made by plaintiff after he had gone 35 yards from the place where he was ejected from a moving train have been held admissible as part of the res gestæ. Missouri, K. & T. Ry. Co. v. Sanders (Tex. Civ. App.) 33 S. W. 245.

[2] Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 3 N. E. 836; Firkins v. Railway Co., 61 Minn. 31, 63 N. W. 172.

[3] Taylor v. Railway Co., 48 N. H. 304; Kennedy v. Railroad Co., 130 N. Y. 654, 29 N. E. 141, reversing 54 Hun, 183, 7 N. Y. Supp. 221; Reed v. Railroad Co., 45 N. Y. 574, reversing 56 Barb. (N. Y.) 493; Barrelle v. Railroad Co. (Sup.) 4 N. Y. Supp. 127, affirmed in 121 N. Y. 697, 24 N. E. 1099; Winter v. Railway Co., 74 Iowa, 448, 38 N.

sleeplessness at night, in response to inquiries made by the witness next morning, is a narrative of a past transaction, and is hearsay and not admissible.[4] The tendency of recent cases is to strictly confine such evidence within the limits above indicated. Prior to the time when parties were competent witnesses, the declarations of an injured person, long after the accident, that he is suffering pain, were admissible from the necessities of the case.[5] But since parties have been made competent witnesses, evidence of simple declarations of

W. 154. In Williams v. Railway Co. (Minn.) 70 N. W. 860, it is said: "The question as to the circumstances under which expressions or declarations of pain and suffering are admissible in evidence in behalf of the person making them is one of much importance, especially in view of the rapid growth of personal injury suits, and the increased frequency with which physicians are called as expert witnesses. At the outset, it is necessary to note the distinction, often overlooked, between mere descriptive statements of pain, or other subjective symptoms of a malady, which furnish no intrinsic evidence of their existence, and those exclamations and complaints which are the spontaneous manifestations of distress, and which naturally and instinctively accompany and furnish evidence of existing suffering. Exclamations and expressions of the latter kind are the natural language of pain; and, whenever its existence at a particular time is a relevant fact, such manifestations of it are always admissible as original evidence, under the ordinary application of the rule of res gestæ. They are in the nature of verbal acts, and may always be testified to and described by any person in whose presence they were uttered."

[4] Kelley v. Railroad Co., 80 Mich. 237, 45 N. W. 90. A witness, not a physician, testified that several hours after the accident he asked plaintiff, "What is the matter? How badly are you hurt?" and that plaintiff replied: "I can't tell, but I am pretty badly off." Held incompetent. Firkins v. Railway Co., 61 Minn. 31, 63 N. W. 172.

[5] See Caldwell v. Murphy, 11 N. Y. 416, affirming 1 Duer (N. Y.) 233. The declaration of an injured person, that he is suffering terrible pain, made several days after the accident, has been held admis-

a party, made some time after the injury, and not to a physician for the purpose of being attended professionally, and simply making the statement that he or she is then suffering pain, are not admissible.[6]

Statements of pain and suffering made by an injured person to his attending physician stand on a somewhat different footing from declarations made to other persons. The rule is that declarations of an injured person to his physician during his illness, explanatory of his symptoms, may be received, if such declarations do not involve a statement of the cause of the injury.[7] From the necessity of the case, the physician

sible in evidence, where the injuries were so severe that she was unable to testify personally. De Long v. Railroad Co., 37 Hun (N. Y.) 282.

[6] Roche v. Railroad Co., 105 N. Y. 294, 11 N. E. 630.

[7] Missouri, K. & T. Ry. Co. v. Sanders (Tex. Civ. App.) 33 S. W. 245; Ashton v. Railway Co., 78 Mich. 587, 44 N. W. 141; Matteson v. Railroad Co., 35 N. Y. 487, affirming 62 Barb. (N. Y.) 364; Murphy v. Railroad Co., 66 Barb. (N. Y.) 125. In an action for injuries, a physician who was called to treat plaintiff may testify as to exclamations of pain by plaintiff during an examination made with a view to such treatment. Hedule v. Railway Co. (Mich.) 70 N. W. 1096. Testimony of a physician that plaintiff had expressed to him his physical anguish during the progress of the trial, long after the accident, is admissible as part of the res gestæ, where it appears that the expressions were involuntary and instinctive, and related exclusively to plaintiff's condition at the time. Schuler v. Railroad Co., 1 Misc. Rep. 351, 20 N. Y. Supp. 683. It has been said, however, that the test of admissibility of statements by a patient, indicating pain and suffering, made to a physician, is not whether they were made before or after action for the injuries was brought, but whether they indicate pain and suffering when made. Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 51 Fed. 649. So, it has been said that statements made to a physician in his professional capacity are competent when descriptive of existing symptoms or pains, although they

may testify to the party's statement as to his symptoms, the locality and character of the pain, and explanations of his bodily condition, made while suffering, and for the purpose of enabling the physician to form an opin-

are not admissible when mere narratives of past occurrences. Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 559, 14 N. E. 572, and 16 N. E. 197. Declarations by plaintiff, to his nurse and physicians, that, some time after the accident, a piece of nail had come out of his knee, are not a part of the res gestæ, and are inadmissible. Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. 830. The tendency of recent cases is to restrict this class of testimony within narrower limits than formerly. "According to the great weight of modern authorities, the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances: First. They must have been made to a medical attendant for the purpose of medical treatment. Second. They must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past transactions or symptoms, however closely related to the present sickness. This was probably always the rule, but the courts are now disposed to apply it more strictly than formerly. Third. Such statements are only admissible when the medical attendant is called upon to give an expert opinion based in part upon them. He cannot merely testify to the statements, and then stop. In the absence of any expert opinion based on the statements, they stand on the same footing as if made to a nonexpert witness. We find no case which expressly and directly announces this proposition, but we think it is clearly implied and logically follows from the fact that such statements are held to be admissible only when made to a person of scientific medical knowledge. Moreover, there is a practical reason for such a rule. A physician has both the ability and opportunity of observing and ascertaining whether the patient's statements of subjective symptoms correspond with the objective symptoms, and hence of forming a fairly accurate opinion as to whether such statements are true or false; and, when he comes to give his expert opinion, presumably he will base it on such statements only so far as he believed them to be true. He might truthfully and safely testify that the patient made certain statements to him, and yet be unwilling to venture an

ion of the nature and extent of the injury.[8] Thus a physician who was consulted by plaintiff the day after an accident, for the purpose of treatment, may testify to symptoms then existing, though he cannot distinguish between what he has himself observed and what plaintiff told him, and though it appears that plaintiff was then contemplating suit.[9] Of course, statements made by an injured person to his physician as to how he was injured, or as to the cause of the injury, are inadmissible, especially if made three or four days after the accident.[10]

In some states the declarations of an injured person, and even his exclamations of pain, are excluded, though made to a physician, if they were made to enable him to qualify as an expert at the trial as a witness for the injured person, and not for the purpose of treatment.[11]

opinion that they were true, or, if true, that such symptoms were caused by or in any way connected with the injury complained of." Williams v. Railway Co. (Minn.) 70 N. W. 860. See, also, post, § 470.

[8] Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 8 South. 142.

[9] Stone v. Railway Co., 88 Wis. 98, 59 N. W. 457.

[10] Webber v. Railway Co. (Minn.) 69 N. W. 716; Lake Shore & M. S. R. Co. v. Yokes, 12 Ohio Cir. Ct. R. 499.

[11] Stewart v. Everts, 76 Wis. 40, 42, 44 N. W. 1092; Abbot v. Heath, 84 Wis. 317, 320, 54 N. W. 574; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537. In this last case it was said: "It is difficult to lay down any very clear line of admission or exclusion, where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes

§ 457. DECLARATIONS AND ACTS OF THIRD PERSONS.

Declarations and acts of third persons are not admissible against or in favor of either of the parties to an action, unless such declarations or acts form part of the res gestæ of the subject under investigation. Thus, in an action for the expulsion of a passenger from a train, while the presence and hearing of others may properly be put in evidence on the question of damages, as naturally producing feelings of annoyance and shame, the particular comments made afterwards by other persons, constituting no part of the transaction, are not admissible to enhance the damages.[1] So, in an action for the death of a child, thrown under the wheels of a street car, evidence of witnesses that they heard a woman shout "murder" after the accident is

them in general from suspicion. But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called on to give medical treatment. The case had been relinquished long before as requiring no further attendance. They were sent for merely to enable plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in mind just what expressions her cause required. They were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency, if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor." In Indiana, however, such declarations seem to be admissible. Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 271, 3 N. E. 833.

§ 457. [1] Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. 312.

not admissible.[2] A statement by plaintiff's physician, after examining him, as to the cause or nature of his injuries, is not admissible. The physician himself should be called as a witness.[3] So, declarations by a husband as to how his wife was injured, made some time after an accident, and not shown to have been in her hearing, are not admissible against her, in an action by her for the injuries.[4]

But the acts or declarations of third persons are admissible in evidence whenever they form a part of the res gestæ of the subject under investigation. Thus, where a passenger is injured in an attempt to escape an apparently imminent danger, evidence of the action of other passengers is competent as part of the res gestæ, and as showing what they, being in the same dangerous situation, deemed prudent conduct.[5] So, in an action for personal injuries sustained in the derailment of a train alleged to have been caused by excessive speed, a witness who has detailed facts as to the high rate of speed may testify to an exclamation made by a fellow passenger calling attention to the speed.[6] So, in a similar case, where the defense is that the train was willfully wrecked by third persons who had been

[2] Leahey v. Railway Co., 97 Mo. 165, 10 S. W. 58.

[3] Missouri, K. & T. Ry. Co. v. Dawson (Tex. Civ. App.) 29 S. W. 1106; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 South. 337.

[4] Keller v. Railroad Co., 27 Minn. 178, 6 N. W. 486.

[5] Mitchell v. Railroad Co., 87 Cal. 62, 25 Pac. 245; Twomley v. Railroad Co., 69 N. Y. 158; Kleiber v. Railway Co., 107 Mo. 240, 17 S. W. 946; Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15; St. Louis & S. F. Ry. Co. v. Murray, 55 Ark. 248, 18 S. W. 50; Ranney v. Railroad Co., 67 Vt. 594, 32 Atl. 810.

[6] Missouri Pac. Ry. Co. v. Collier, 62 Tex. 318.

shortly before discharged by the company, evidence of threats made by such persons to ditch a train is admissible, in connection with evidence that they had wrecked the train.[7] So, in an action for injuries to an 11 year old boy in jumping from a train as it was passing a depot platform, evidence that just before he jumped an adult passenger told him that the train would not stop is admissible as part of the res gestæ. While the company is not responsible for the act of a stranger, yet such statement is admissible on the issue of contributory negligence, as tending to throw light on the boy's mind at the time, and to show all the circumstances which influenced his action.[8] So, also, a witness who saw an injury to a passenger while attempting to board a car may testify to a remark made by a third person calling the witness' attention to the passenger's danger. Such evidence is admissible to show that his mind was retentive of an important relevant fact deposed to by him, and as serving to impress him with the correctness and accuracy of his memory.[9]

§ 458. REAL OR DEMONSTRATIVE EVIDENCE.

As a general rule witnesses at the trial testify to facts within their knowledge. But sometimes physical objects are exhibited to the jury, and such objects may be termed real or demonstrative evidence. It is well settled that in a personal injury case it is within the discretion of the trial court to allow plaintiff to ex-

[7] Worth v. Railway Co., 51 Fed. 171.

[8] Hemmingway v. Railway Co., 72 Wis. 42, 37 N. W. 804.

[9] Birmingham Electric Ry. Co. v. Clay, 108 Ala. 233, 19 South. 309.

hibit to the jury his injured limb or body to prove the extent of his injuries.[1] So, it is not error to allow a physician, during the progress of a trial, to exhibit plaintiff to the jury in his then condition, and to place him in different attitudes, in order to enable them to determine the extent of his disability.[2] So the court has power, in a proper case, and under proper circumstances, to require plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of his injuries. But the propriety of doing so in a given case rests largely in the discretion of the trial court.[3]

Physical objects, as pieces of broken rail, may also be put in evidence in proper cases. But it is error to permit plaintiff to introduce pieces of the broken rail picked up at the place of the accident, six months after it occurred, which had been exposed to the action of the weather from January until June, and to allow the jury to draw therefrom a conclusion as to the soundness of the rail at the time of its breakage.[4]

§ 458. [1] City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572; Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571; Mulhado v. Railroad Co., 30 N. Y. 370.

[2] Citizens' St. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627.

[3] Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. 176. In this case the uncontradicted evidence of a number of witnesses showed that, since receiving the injuries complained of, plaintiff was lame, and limped when she walked. Held not error for the court to refuse to require her to walk across the court room in the presence of the jury.

[4] Stewart v. Everts, 76 Wis. 35, 44 N. W. 1092. The court said: "It is evident that after such exposure no inexperienced man could tell whether there were any flaws in the rim at the place where it was broken; and it is equally clear that the inexperienced jurors

Experiments and demonstrations may be put in evidence, provided they are made under conditions similar to those attending the fact to be illustrated; and, when this rule is observed, the discretion of the trial court in allowing the result of such experiments to go to the jury will not be reviewed, in the absence of abuse thereof.[5]

§ 459. PHOTOGRAPHS.

A photograph of the locus in quo of an accident is admissible in evidence after proof that it is a fair representation of the locality.[1] But, in an action for injuries sustained by reason of an alleged defect in a street car, a photograph of another car has been held inadmis-

would not be competent, from mere inspection, to determine the quality of the iron at the time of the breakage." In an action for injuries sustained in a railroad wreck, caused by the breaking of a car axle, a witness cannot describe to the jury an axle brought to him after the accident, reputed to have been brought from defendant's railroad, unless it is identified as the one broken at the accident; and it is not sufficient that the one in question "was broken exactly as the other witnesses saw the axle made by the wreck after the injury." Central Railroad & Banking Co. v. Dottenheim, 92 Ga. 425, 17 S. E. 662.

[5] Leonard v. Southern Pac. Co., 21 Or. 555, 28 Pac. 887. In an action for injuries sustained by the alleged sudden starting of a street car while plaintiff was attempting to get on board, a witness who has made an experiment to see how a person placed on the step of a car, as plaintiff described himself to have been placed, would fall on the car being suddenly started, may testify that the falling was in a direction different from that testified to by plaintiff. Gilbert v. Railway Co., 54 N. Y. Super. Ct. 270. A refusal of the trial court to permit the jury to witness experiments with street cars, as bearing on the nature of a collision, will not be reviewed on appeal, the case not being within the statute allowing a view by the jury. Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827.

§ 459. [1] Archer v. Railroad Co., 106 N. Y. 589, 13 N. E. 318.

sible, though supplemented by evidence that the two cars are alike.[2]

In an action for personal injuries, a photograph showing the manner in which plaintiff's legs are contracted is admissible, after it is shown by a witness that it was taken in his presence, and correctly represents the condition of plaintiff's limbs.[3] But a photograph of plaintiff taken some months before an accident is not admissible to show his health and strength at that time, though accompanied by evidence that his physical appearance had not changed in the meantime.[4] The court said: "It is common knowledge that photographs may be taken, and often are taken, in such a way as to make the person taken appear younger and less infirm than he is or than he looks. * * * Courts are not required to try cases by such comparisons, when there is no lack of evidence directly pertinent. * * * There was no difficulty in producing direct evidence of the apparent physical condition of the plaintiff at the time of the accident from persons who saw and knew him; and, without determining that a photograph can never be received as evidence of the health and strength of a person, we think at least it was in the discretion of the court to reject it."

2 People's Pass. Ry. Co. v. Green, 56 Md. 84.

3 Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35, affirming 43 Hun (N. Y.) 421.

4 Gilbert v. Railway Co., 160 Mass. 403, 36 N. E. 60.

§ 460. PHYSICAL EXAMINATION OF PLAINTIFF.

There is a decided conflict of authority in the United States as to the power of the court to compel a plaintiff in an action for personal injuries to submit his person to an examination by experts to ascertain the extent and nature of the injuries. Historically considered, there can be no question that courts of common law have no inherent power to, and, in the absence of statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. This is the rule which has been adopted by the supreme court of the United States,[1] and it consequently prevails in all the federal courts. It is likewise the rule in Illinois,[2] Indiana,[3] Nebraska,[4] and

§ 460. [1] Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000.

[2] Parker v. Enslow, 102 Ill. 272; Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951.

[3] Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860. But though the court has no power to require plaintiff in an action for personal injuries to submit his person to an examination of experts, yet where he claims to be suffering from albumen and sugar in the urine, as a result of the injury, the court may require him to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him. "Urine which has passed from the body is no part of the person. It is a lifeless substance, separated

[4] Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419.

New York.[5] "No right," says Mr. Justice Gray,[6] "is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unequivocal authority of law. The inviolability of the person is as much invaded by compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administra-

forever from the individual, and it can be no more indignity to his person to subject such substance to examination and analysis than it would be to require a like examination of his cast-off clothing of the same individual." Cleveland, C., C. & St. L. Ry. Co. v. Huddleston (Ind. Sup.) 46 N. E. 678.

[5] McQuigan v. Railroad Co., 129 N. Y. 50, 29 N. E. 235; McSwyny v. Railroad Co., 54 Hun, 637, 7 N. Y. Supp. 456; Roberts v. Railroad Co., 29 Hun (N. Y.) 151; Newman v. Railroad Co., 50 N. Y. Super. Ct. 412. The case of Walsh v. Sayre, 52 How. Prac. (N. Y.) 334, the pioneer case permitting such an examination, is expressly overruled by these decisions. The question whether or not it is proper for a trial court to require such an examination has been discussed by the supreme court of Texas, but never decided. Gulf, C. & S. F. Ry. Co. v. Northeet, 78 Tex. 321, 14 S. W. 703; Missouri Pac. Ry. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325; International & G. N. Ry. Co. v. Underwood, 64 Tex. 465; Gulf, C. & S. F. Ry. Co. v. Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588. But recently one of the civil courts of appeals has held that the trial court has no power to compel plaintiff, in an action for personal injuries, to submit to examination by experts to be appointed by the court. Gulf, C. & S. F. Ry. Co. v. Pendery (Tex. Civ. App.) 36 S. W. 793.

[6] Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000.

tion of justice, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." [7] So, the court of appeals of New York, in a still more recent case,[8] says: "It is a significant fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of the power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. * * * It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in

[7] The opinion then proceeds to show that the authority of divorce courts to order an inspection in cases of alleged impotence is derived from the civil and canon law, and not from the common law. The common-law writ de ventre inspiciendo, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law to guard against the taking of life of an unborn child for the crime of the mother. So, also, when a widow was suspected to feign herself with child in order to produce a fictitious heir, in which case the heir or devisee might have a writ to examine her, and, if with child, to keep her under proper restraint till delivered.

[8] McQuigan v. Railroad Co. (1891) 129 N. Y. 50, 29 N. E. 235.

America until within a very recent period, never in fact had any existence."

But in very many of the states the rule prevails that the trial court has the power to require plaintiff in a personal injury case to submit to a physical examination in advance of the trial. This is the rule in Alabama,[9] Arkansas,[10] Georgia,[11] Iowa,[12] Kansas,[13] Michigan,[14] Missouri,[15] and Wisconsin.[16] The grounds for this rule are thus stated by the supreme court of Iowa, in a leading case [17] on the subject: (1) A party to an action has the right to demand the administration of exact justice, and, to this end, that evidence essential thereto and within the control of the court shall be produced. (2) It is within the power of the court to compel an examination, since the plaintiff is before it as a witness, and upon his refusal he may be treated as a recusant. (3) The courts have authority to direct an

[9] Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 8 South. 90.

[10] Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, and 31 S. W. 147; Sibley v. Smith, 46 Ark. 275.

[11] Richmond & D. R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602. Code Ga. 1882, § 206, declares: "Every court has power to control, in furtherance of justice, the conduct of all persons connected with a judicial proceeding before it, in any matter appertaining thereto."

[12] Schroeder v. Railroad Co., 47 Iowa, 375.

[13] Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466.

[14] Graves v. City of Battle Creek, 95 Mich. 266, 54 N. W. 757.

[15] Owens v. Railway Co., 95 Mo. 169, 8 S. W. 350; Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. 701; Shepard v. Railway Co., 85 Mo. 634; Norton v. Railway Co., 40 Mo. App. 642. A contrary view was at one time announced by the supreme court of Missouri. Loyd v. Railroad Co., 53 Mo. 509.

[16] White v. Railway Co., 61 Wis. 536, 21 N. W. 524.

[17] Schroeder v. Railroad Co. (1877) 47 Iowa, 375.

examination in actions of divorce on the ground of impotency. (4) Plaintiffs are permitted, in actions for personal injuries, to exhibit their wounds or injuries to the jury. In states where this view prevails, the law is accurately stated by the supreme court of Alabama [18] as follows: "(1) Trial courts have the power to order the surgical examination, by experts, of the person of a plaintiff who is seeking a recovery for personal injuries. (2) Defendant has no absolute right to have an order made to that end, and executed, but the motion therefor is addressed to the sound discretion of the trial court. (3) The exercise of that discretion will be reviewed on appeal, and corrected in case of abuse. (4) The examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure, or more certain ascertainment, of facts which can only be brought to light or fairly elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain. (5) The refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of discretion lodged in the trial court as will operate to reverse a judgment in plaintiff's favor." [19]

[18] Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 8 South. 90.

[19] In this case it was further said: "The fact that a plaintiff in an action for personal injuries is a young, refined, unmarried woman, of a nervous temperament, is no ground for refusing a physical examination by experts to determine the nature and extent of her injuries. Her delicacy and refinement of feeling, though, of course, entitling

In 1893, after the decision of the court of appeals denying the power of the courts to order a physical examination, the legislature of New York enacted a statute which confers such power on the courts on granting an order for the examination of plaintiff before the trial.[20] This statute, it has been held, does not violate

her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense for a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant on the other, the law cannot hesitate; justice must be done." But the selection of experts to make a physical examination of the person of plaintiff to ascertain the extent of her injuries rests entirely with the trial court, and its refusal to appoint a particular physician demanded by defendant is not subject to review on appeal. Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722. A motion to compel plaintiff, in an action for personal injuries, to submit to a physical examination, made a few days before trial, is properly denied, when the granting of the motion would probably necessitate a postponement of the trial. Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495. The supreme court will not reverse the action of a trial judge in refusing, pending the trial of a suit for personal injuries, to order a medical examination of the plaintiff, when it appears that no such request was made of the plaintiff before the trial began, and no request to this effect was made of the court until after plaintiff's evidence had been closed, and it was then impracticable, without too long a suspension of the trial, to obtain a satisfactory and competent physician, by whom an impartial examination could then be made. While the power to order such an examination exists, it is in each case to be exercised according to the sound discretion of the presiding judge. Savannah, F. & W. Ry. Co. v. Wainwright (Ga.) 25 S. E. 622. In an action for personal injuries, the fact that the examination of plaintiff by physicians employed by defendant to ascertain the extent of the injuries was unnecessarily harsh and

[20] Code Civ. Proc. N. Y. § 873, as amended by Laws N. Y. 1893, c. 721, and Laws N. Y. 1894, c. 428, p. 873.

any of the express or implied restraints upon the legislative power to be found in either the federal or state constitutions.[21] But the statute does not authorize an order directing a physical examination apart from or independent of an examination of plaintiff as a witness before the trial.[22] The reasons for the enactment of this statute have thus been stated:[23] "The extent and nature of the injuries suffered by the plaintiff are always important, and frequently by far the most important of the facts to be presented to the jury, because it is upon proof of the nature and extent of the injuries that the jury must base its conclusions as to the damages which should be recovered. Experience has shown that the damages suffered by plaintiff was a matter almost exclusively within his own knowledge, and especially was this so when the symptoms were merely subjective. In such a case, it almost always happened that the jury had no evidence upon the question of damages, except the testimony and declarations of plaintiff, and his complaints made to his physicians, and the inferences of the physicians drawn from this statement. In such cases it was utterly impossible for the defendant to obtain possession of any fact before the trial upon which to base his testimony. This condition of affairs frequently resulted in grave miscarriages of justice, and, while this was not always the case, yet it not seldom happened that, when the ac-

annoying cannot be considered on the question of damages. Goodhart v. Railroad Co. (Pa. Sup.) 35 Atl. 191.

[21] Lyon v. Railway Co., 142 N. Y. 298, 37 N. E. 113.

[22] Id.

[23] Green v. Railroad Co., 10 Misc. Rep. 473, 32 N. Y. Supp. 177.

tion was submitted to a jury, the evidence upon the question of damages was so inadequate that the verdicts were exceedingly unsatisfactory."

§ 461. BEST EVIDENCE — EVIDENCE ON FORMER TRIAL.

It is elementary that the best evidence of which the case is in its nature susceptible must be produced.[1] Parol evidence is not admissible to show the sale of a street railroad by one company to another, where it appears that the contract of sale is in writing, and its absence is not accounted for.[2] A written statement as to the extent and nature of a patient's injuries, made by her attending physician for the purpose of giving information to her husband, is not admissible against defendant in an action for such injuries, as evidence of the facts therein recited, even where the physician swears at the trial that in his opinion it correctly states the condition of the patient at the time referred to, unless it further appears that he is unable to testify from memory.[3] But, to prove the running time of trains, it

§ 461. [1] 1 Greenl. Ev. § 82.

[2] Ricketts v. Railway Co., 85 Ala. 600, 5 South. 353. Parol evidence of the contents of a railroad ticket is not admissible, unless its nonproduction is first accounted for. Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5.

[3] Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118. The court said: "The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him, under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it. But there are cases which declare, unless prepared in the discharge of some public duty, or out of some duty arising out of the business relations of the

is not necessary to introduce the published time-tables; such fact may be established by witnesses who knew the time from their observation of the arrival and departure of trains.[4] So a conductor of a street car may testify as to his recollection of the number of passengers on the car at the time of the accident, without producing the slip taken from the register of the car showing the number of passengers on that trip. Such register is not the best evidence, nor, indeed, any evidence at all, of the number of passengers on his car at the time of the accident.[5]

The testimony of a witness, since deceased, taken in a former trial, is admissible on a subsequent trial of

witness with others, or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence. Lightner v. Wike, 4 Serg. & R. (Pa.) 203; Calvert v. Fitzgerald, Litt. Sel. Cas. (Ky.) 388; Lawrence v. Barker, 5 Wend. (N. Y.) 305; Redden v. Spruance, 4 Har. (Del.) 265, 267; Field v. Thompson, 119 Mass. 151. There are, however, other cases to the effect that where the witness states under oath that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper may be received as the best evidence of which the case admits. Russell v. Railroad Co., 17 N. Y. 134, 140; Guy v. Mead, 22 N. Y. 465; Merrill v. Railroad Co., 16 Wend. (N. Y.) 586; Kelsea v. Fletcher, 48 N. H. 282; Haven v. Wendell, 11 N. H. 112; Mims v. Sturdevant, 36 Ala. 636, 640; State v. Rawls, 2 Nott & McC. (S. C.) 331, 334."

[4] Chicago, B. & Q. R. Co. v. George, 19 Ill. 510. A train schedule is admissible in evidence to show that a train on which plaintiff took passage did not stop at the station of his destination. New York & N. E. R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20.

[5] Wynn v. Railway, 91 Ga. 344, 17 S. E. 649.

the same issues between the same parties.[6] But, to be thus admissible, it must appear that the adverse party had an opportunity to cross-examine the witness.[7] So, to render a deposition in one case admissible in another, identity of subject-matter, in whole or in part, and identity of parties in interest, must unite. Hence, in an action for personal injuries sustained while getting on a ferryboat, plaintiff's deposition, taken in another action for injuries to his wife, sustained at the same time, is not admissible, though he has died in the meantime.[8] In some of the states, the absence of a witness from the state, coupled with his refusal to attend at the trial, will admit his testimony given on a former trial; but in other states it must appear that the whereabouts of the absent witness could not be dis-

[6] 1 Greenl. Ev. § 163; Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. 571. The longhand notes made by the sworn stenographer, who took the evidence on the former trial, are the best evidence of the testimony of the dead witness, and should be used, or the nonproduction thereof legally accounted for, on a second trial; but where these notes show that the dead witness made an illustration, and do not show what that illustration was, or in any way convey it to the second jury, a witness may be used to prove what such illustration was. Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571. Where the issue is as to the condition of the brakes of a street car at the time of an accident, it is prejudicial error to permit plaintiff to ask a witness for defendant, on cross-examination, whether he had not been told that the motorman in charge of the car had testified on a former trial that the brakes were out of order, since this question assumed as a fact, without other proof, that the motorman had so testified. Howland v. Railway Co. (Cal.) 47 Pac. 255.

[7] Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331.

[8] Fearn v. Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

covered on diligent search, and that his testimony cannot be taken by deposition.[9]

§ 462. MISCELLANEOUS DECISIONS — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

A rule of a railroad company prohibiting trains from passing passenger trains at stations while receiving and discharging passengers is admissible to show negligence in running an engine past a station so as to strike a passenger just after he has alighted.[1] So a rule of a street-railway company, calling on its drivers to prevent intoxicated persons from riding on the front platforms of its cars, is admissible to justify the driver's refusal to permit plaintiff, when intoxicated, to get on the front platform, though plaintiff was ignorant of the rule.[2]

[9] 1 Greenl. Ev. § 163; New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. Law, 137; Berney v. Mitchell, 34 N. J. Law, 337.

§ 462. [1] Lake Shore & M. S. Ry. Co. v. Ward, 135 Ill. 511, 26 N. E. 520; s. c. 35 Ill. App. 423. But the rules promulgated by the board of railroad commissioners governing the management of railroad trains, where railroads cross each other at grade, are not admissible in evidence until it is shown that they have been served upon or brought to the knowledge of the company against which they are offered in evidence. Chicago, K. & W. R. Co. v. Ransom (Kan. Sup.) 44 Pac. 6.

[2] O'Neill v. Railroad, 155 Mass. 371, 29 N. E. 630. In an action for injuries to a passenger alleged to have been caused by a violation of defendant's rules on the part of its servants, a book containing the rules and regulations of the company, and intended for the use of its employés, is admissible in evidence. Hobbs v. Railroad Co., 66 Me. 572. Where the court admits evidence that the conductor of the train knew that plaintiff was riding in a box car before the wreck,

Where negligence is charged in running a train at a high and dangerous rate of speed, evidence as to the speed of the train one and one-half miles from the place of the accident is admissible, in connection with evidence that the speed was not checked up to the time of the accident.[3]

In an action for injuries to a passenger in alighting, it is competent to show that no conductors or trainmen were on hand to assist passengers in alighting, not as a ground of recovery, but as showing the surroundings.[4] So, evidence that the train was behind time is admissible as tending to show the existence of a reason or motive for making only a short stop.[5]

In an action for injuries to plaintiff's arm, which was struck by a mail crane while resting on the window sill of the car, plaintiff is entitled to prove all the circumstances attending the accident as part of the res gestæ,

evidence by the railway company that the conductor did not approach the box car while he was in charge of the train, and that he did not know that plaintiff was on the car, is admissible on the issue as to whether plaintiff was a passenger. Chicago, R. I. & P. Ry. Co. v. Lee, 22 C. C. A. 132, 76 Fed. 212.

[3] Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551, 566, 9 N. E. 476. Where a passenger on a street car is thrown down in a collision with another car, the speed of the car at the time may be shown to prove the violence of the fall. Gillespie v. Railroad Co. (City Ct. Brook.) 16 N. Y. Supp. 850.

[4] Sherwood v. Railway Co., 88 Mich. 108, 50 N. W. 101. In an action for injuries sustained by the sudden starting of a street car while alighting, evidence as to what occurred when plaintiff got on the car, tending to prove malice on the part of the driver, is not admissible. Grisim v. Railway Co., 84 Wis. 19, 54 N. W. 104.

[5] Killian v. Railroad Co. (Ga.) 25 S. E. 384.

and to show that others in the car heard the noise of the collision of the crane with the car.[6]

In an action for injuries to a passenger caused by an alleged defect in the means of transportation, evidence is admissible for defendant that general orders were given to have the materials all of the safest kind, or that directions were given to have the particular part alleged to be defective of the best kind.[7]

In an action for injuries sustained by the sudden starting of the train in attempting to board cars which had been standing at the station for some time, evidence that the doors of the cars were locked is admissible on the question whether plaintiff was negligent

[6] Hallahan v. Railroad Co., 102 N. Y. 194, 6 N. E. 287. In an action for injuries to a passenger on a steamer received during a melée on board, evidence as to the manner in which the officers attended to their duty while the disturbance was going on, the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite, are admissible as part of the res gestæ. Norwich & N. Y. Transp. Co. v. Flint, 13 Wall. 3, affirming 7 Blatchf. 536, Fed. Cas. No. 4,874. In an action by a boy for injuries sustained in alighting from a street car in front of the post office, evidence that the driver requested the boy to take a bundle of papers to the post office is admissible to show the driver's knowledge of the boy's intention to get off the street car. Brennan v. Railroad Co., 45 Conn. 284.

[7] Simmons v. Steamboat Co., 100 Mass. 34. Where plaintiff has testified that the train was running at an unusual rate of speed at the time of the accident, and that it was racing with another train on a parallel track, it is error to reject testimony offered by defendant that the train was running at its usual rate of speed, though not accompanied by an offer to show that such rate was a safe and proper rate, since the excluded testimony would contradict plaintiff's evidence, and would show that there was no race with a train on a parallel track. Worthen v. Railway Co., 125 Mass. 99.

in delaying to get on board.[8] The fact that a passenger had never ridden on an electric car before the time of an accident is admissible in evidence to illustrate the cause of his failure to alight in safety.[9]

§ 463. SAME—IN ACTIONS FOR EJECTION AND WRONGFUL ARREST.

In an action by a passenger for expulsion from a train, where there is a question on the trial as to the validity of the ticket offered by him, it is competent for the conductor to testify as to whether or not such ticket was, as to size and shape, such as was issued by defendant during the period within which it was claimed to have been purchased.[1] In an action for the ex-

[8] Dawson v. Railroad Co., 156 Mass. 127, 30 N. E. 466. Where the issue is whether plaintiff was injured by the sudden starting of a street car as he was getting on board, or by holding onto it, and endeavoring to board it, after its speed had increased so as to endanger him, plaintiff's testimony that his hand was fastened in the handhold of the car, and that he could not let go, and that he was dragged some distance by the moving car, is admissible to rebut contributory negligence. Chrisue v. Railroad Co. (Tex. Civ. App.) 39 S. W. 638.

[9] Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

§ 463. [1] Chicago & E. R. Co. v. Ault, 10 Ind. App. 661, 38 N. E. 492. In an action for the ejection of a passenger, the issue was whether the ticket, which was in a mutilated condition at the trial, was limited to expire in 1889 or in 1890. Held, that evidence by the ticket agent that he had authority to sell tickets good only for 30 days from date of sale was admissible to enable the jury to determine what date he probably put on the ticket. Dooley v. Railway Co., 89 Iowa, 450, 56 N. W. 543. Where the issue is as to whether plaintiff was notified that a mileage ticket sold to him was not good over the portion of the road on which he was traveling when ejected, evidence that a similar mileage ticket had been sold to another person about the time of sale to plaintiff, and that such ticket was used without re-

pulsion of a passenger, who left the train in alleged obedience to the conductor's order, without the application of force, the question whether the conductor intended to expel plaintiff, or was misunderstood as to his purpose, was relevant evidence on the claim for punitive damages. The conductor is competent to testify as to what his intention really was.[2] In an action for the ejection of a passenger from a moving train, where plaintiff alleges that after the ejection one of defendant's brakemen robbed him of $85 in money, and defendant denies the fact of ejection and of the robbery, it is error to exclude evidence that plaintiff made no complaint to defendant or the public authorities about the ejection or robbery until the action was commenced, two years afterwards.[3] But, in an action for the ejection of a passenger from a street car for nonpayment of fare, evidence is not admissible that he had

striction on defendant's road, is properly rejected. Oppenheimer v. Railroad Co., 9 Colo. 320, 12 Pac. 217.

[2] Georgia Railroad & Banking Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061. Where punitive damages are claimed for the ejection of a passenger, evidence by the conductor that, when he ejected plaintiff, he believed that plaintiff had not surrendered a ticket entitling him to be carried, and that he believed it to be his duty to eject plaintiff on his refusal to pay fare, is competent on the question of damages. Yates v. Railroad Co., 67 N. Y. 100.

[3] Washburn v. Railway Co., 84 Wis. 251, 54 N. W. 504. In an action for false imprisonment for alleged disorderly conduct on a street car, plaintiff testified in chief that there were other passengers on the car, and that he did not hear them complain of him. Held, that testimony by the officers who made the arrest that the passengers in the car at the time expressed their approval of the arrest was competent to disprove plaintiff's testimony. McGuire v. Railroad Co., 62 Hun, 623, 16 N. Y. Supp. 922.

been ejected, on another occasion, from a railroad train for nonpayment of fare.[4] In an action for false imprisonment on a charge of disorderly conduct on a street car, defendant, to excuse the absence of the car driver as a witness, may give evidence of its search and inquiry for him, and its inability to find him, he being no longer in its employ.[5]

§ 464. SAME—AS TO DAMAGES AND INJURIES.

In an action for personal injuries negligently inflicted, evidence as to defendant's financial condition is inadmissible.[1] But, in actions for injuries willfully and wantonly inflicted, evidence as to defendant's financial ability is admissible on the subject of exemplary damages. The reason is that a sum which would be a severe punishment to a man of small means would be little or none to a man of large means.[2] But, in an

[4] Sprenger v. Traction Co. (Wash.) 47 Pac. 17.

[5] McGuire v. Railroad Co., 62 Hun, 623, 16 N. Y. Supp. 922. Where one presents detached coupons from a mileage ticket, without producing the ticket itself, as required by its terms, and is arrested for nonpayment of fare, he cannot strengthen his direct testimony, that he believed he had the right to use the detached coupons, by testifying to other facts which would make it likely that he believed what he said. Marshall v. Railroad Co., 145 Mass. 164, 13 N. E. 384. On cross-examination, a witness for plaintiff was asked whether, on the night of the accident, plaintiff had told him of the cause of his expulsion from the car. The witness then answered that it was not until two days thereafter, and counsel then said, "Oh, it was not until two days after, he told you, then!" to which the witness replied, "Yes." Held, that this question did not entitle plaintiff to put the entire conversation in evidence, since defendant had not required the witness to state any part of it. Perlmutter v. Railway Co., 121 Mass. 497.

§ 464. [1] Higgins v. Railroad, 73 Ga. 149.

[2] Toledo, W. & W. Ry. Co. v. Smith, 57 Ill. 517. But in Georgia it

action against a railroad company and a conductor for the ejection of a passenger, evidence as to the pecuniary ability of the company is not admissible, as it is extremely prejudicial to the conductor.[3]

Evidence as to plaintiff's poverty is not admissible in his behalf, in an action for injuries inflicted by defendant's negligence;[4] nor is evidence as to his wealth admissible in defendant's behalf.[5] But evidence as to the amount of plaintiff's earnings before the accident is competent.[6] Nor is plaintiff excluded by his interest from testifying to the value of his services before and

is held that evidence as to defendant's wealth is not admissible in an action for the ejection of a passenger, because the entire injury is not to the peace, happiness, and feelings of plaintiff, within Code Ga. § 3067. Georgia R. Co. v. Horner, 73 Ga. 251.

[3] Chicago City Ry. Co. v. Henry, 62 Ill. 142; Toledo, W. & W. Ry. Co. v. Smith, 57 Ill. 517.

[4] Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35, affirming 43 Hun (N. Y.) 421. But since an injured person is bound to act in good faith, and to resort to such means as are reasonably within his reach to cure himself, where defendant has shown that plaintiff has not consulted an eminent specialist, it is competent for plaintiff, for the purpose of showing that he resorted to such means as were reasonably within his reach, to prove the fact of his poverty and dependence upon his earnings, and consequently his inability to procure the best medical attendance. Id.

[5] Eagle Packet Co. v. Defries, 94 Ill. 598.

[6] Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35, affirming 43 Hun (N. Y.) 421; Simonin v. Railroad Co., 36 Hun (N. Y.) 214; Walker v. Railway Co., 63 Barb. (N. Y.) 260. But an estimate as to the annual value of plaintiff's labor, based on the business of a steam thresher in which plaintiff at one time had an interest, but which he had parted with before he was injured, without any showing as to what amount belonged to himself, and what to his partners, is incompetent. Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. 830. See, also, post, § ——.

after the injury.[7] So, in an action for injuries to a married woman, the testimony of plaintiff that prior to the accident she was able to do all her household work, and that since the accident she has not been able to do such work, is competent on the question of damage, to show the extent and character of the injuries sustained.[8]

In an action for personal injuries, evidence that plaintiff has a family dependent on him for support is not admissible,[9] nor are the number and ages of his children.[10]

Where a personal injury is permanent, evidence of plaintiff's life expectancy is competent,[11] and standard life tables are admissible for this purpose.[12]

[7] Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737.

[8] Healy v. Railroad Co., 101 Cal. 585, 36 Pac. 125. To show the extent of injuries arising from the fracture of the arm of a married woman, evidence is admissible that before the injury she had made her own clothes, but since then, for the period of a year, she had been unable to do so, and that for many months after the accident she was compelled to employ a hairdresser because she was unable to dress her hair herself. Bigelow v. Railway Co., 48 Mo. App. 367. But plaintiff should not be permitted to state the approximate amount expended by him by reason of the accident and injuries. Such a statement would be dependent on his opinion as to what expenses were legitimately chargeable to his injuries, and is in effect a conclusion upon mixed questions of law and fact. Galveston, H. & S. A. Ry. Co. v. Wesch, 85 Tex. 593, 22 S. W. 957.

[9] Stockton v. Frey, 4 Gill (Md.) 406.

[10] Pennsylvania Co. v. Roy, 102 U. S. 451; Williams v. Railway Co., 123 Mo. 573, 27 S. W. 387; Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[11] Missouri, K. & T. Ry. Co. of Texas v. Simmons (Tex. Civ. App.) 33 S. W. 1096.

[12] Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343.

Evidence as to plaintiff's physical condition before the accident is competent as bearing on his ability to earn a living, and on the amount of damages sustained from the injury.[13] So plaintiff, in describing the effect of the injury, may compare her present physical condition with what it was before the injury.[14] But

In an action for permanent personal injuries, the mortality tables are admissible in evidence, though it appears that plaintiff is in feeble health, is not an insurable risk, and has not the average expectation of life. Though the standard tables are not strictly applicable, yet they are more or less efficient aids in arriving at an approximation of the truth, and that is the best that can be hoped for after all. Arkansas M. Ry. Co. v. Griffith (Ark.) 39 S. W. 550. In an action for permanent injuries to a married woman, such tables are admissible to show the expectancy of her life, where it appears that because of such injuries a servant has been, and probably will continue to be, employed to do the work plaintiff had been accustomed to do. Mcdonald v. Railroad Co., 26 Iowa, 124. But it has been held that such tables are not admissible to show how long plaintiff is likely to live to endure the pain resulting from the injury. Chicago, B. & Q. R. Co. v. Johnson, 36 Ill. App. 564. Mortality tables are not competent evidence, unless there be some evidence as to the value of plaintiff's services or capacity to earn money. Macon, D. & S. R. Co. v. Moore (Ga.) 25 S. E. 460.

[13] Gardner v. Railway Co., 99 Mich. 182, 58 N. W. 49. Where plaintiff was forced to jump from a train while it was running rapidly on a dark night, evidence is admissible that he was at the time afflicted with a rupture, though it was unknown to the conductor, and did not aggravate the injury sustained; the evidence being competent for the purpose of ascertaining the extent of his mental suffering as an element of damages. Fell v. Railroad Co., 44 Fed. 248.

[14] North Chicago St. R. Co. v. Gillow (Ill. Sup.) 46 N. E. 1082, affirming 64 Ill. App. 576. In an action for personal injuries, where plaintiff was confined to her bed for several weeks after the accident, and ultimately went to a hospital for treatment, evidence as to her appearance before and after the injury is admissible. West Chicago St. R. Co. v. Kennedy-Cahill (Ill. Sup.) 46 N. E. 368, affirming 64 Ill.

it has been held that evidence that plaintiff was a child of tender years, when injured, is not admissible.[15]

Evidence as to how plaintiff habitually acted after the accident is admissible for the purpose of establishing the extent of his injuries; as that he tried to work and could not, and that he used his right arm only from the elbow.[16] So, where injuries are claimed for the wrecking of plaintiff's nervous system, defendant ought to be permitted to cross-examine plaintiff as to his skill as a billiard player, to show that he was not injured to the extent claimed.[17]

Where defendant claims that the shrunken and wasted condition of plaintiff's arm is simulated, and is the

App. 538. Plaintiff may prove the state of her health for a reasonable time before the accident. Cooper v. Railway Co., 54 Minn. 379, 56 N. W. 42. Plaintiff's physician may testify as to her condition from six months to two years before the accident, to form a basis for a comparison between her then condition and her condition after the accident. Loudoun v. Railroad Co. (Sup.) 44 N. Y. Supp. 742. But, in an action for personal injuries by a husband for injuries to his wife, it is improper for plaintiff's attorney, on direct examination, to question him in regard to injuries received by him in another accident shortly before the trial, on the plea of explaining an alleged nervousness in plaintiff's manner. Howland v. Railway Co. (Cal.) 47 Pac. 255.

[15] Kreuziger v. Railway Co., 73 Wis. 158, 40 N. W. 657.

[16] Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737.

[17] Gamble v. Railroad, 74 Ga. 586. In an action for alleged injuries to the spine, evidence is admissible to show that on the afternoon before the accident plaintiff had made an assignation with a colored girl for the next day, and that on that day, after the accident, he had walked four or five miles to keep his appointment. Such evidence tends to throw light on his physical condition after the injury. Stevens v. Railroad Co., 80 Ga. 19, 5 S. E. 253. In an action for personal injuries, testimony that plaintiff was treated for spinal injuries is inadmissible to show that she was actually suffering therefrom. Thompson v. Railway Co. (Sup.) 42 N. Y. Supp. 896.

result of long disuse, plaintiff's testimony that after the injury he was instructed by his physician to carry his arm in a sling is competent to repel the imputation of bad faith.[18]

§ 465. OPINION EVIDENCE.

A witness, though a nonexpert, may state his opinion or conclusion where the subject-matter to which his testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time.

The rule that a witness can testify only to facts within his knowledge is almost without exception. One of these exceptions is that stated in the black-letter text. Where the statement of a witness is an inference from many minor details which it would be impossible for him to present to the jury except by the statement of his inference or opinion, that opinion is generally competent.[1] In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. But, as necessity is the ground of admissibility, the moment

[18] Allison v. Railroad Co., 42 Iowa, 274. While it is competent for defendant to show that plaintiff's injuries were wholly or partially the result of improper treatment on the part of his physicians, yet evidence of the reputation of the attending physician for skill is not admissible for this purpose. Thorne v. Stage Co., 6 Cal. 232.

§ 465. [1] Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75.

the necessity ceases the exception to the general rule that requires of a witness facts, and not opinions, ceases also. Hence, when the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without especial knowledge or training, opinions of witnesses, expert or other, are not admissible.[2]

Time, distance, velocity, form, size, age, strength, heat, cold, etc., are subjects as to which the opinions of witnesses are generally received.[3] Thus, a nonexpert witness may give an opinion as to the speed at which a train was moving.[4] But it has been held that the

[2] Graham v. Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151. "The competency of this evidence rests upon two necessary conditions: First, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and, second, that the facts upon which the witness is called upon to give an opinion are such as men in general are capable of comprehending and understanding." Com. v. Sturtivant, 117 Mass. 122, 137.

[3] Whart. Ev. § 612, note; Hackett v. Railroad, 35 N. H. 390.

[4] Louisville, N. A. & C. Ry. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58; Scully v. Railroad Co., 80 Hun, 197, 30 N. Y. Supp. 61; Wilson v. Railroad Co., 8 Misc. Rep. 450, 28 N. Y. Supp. 781; Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081. In an action for an injury to a passenger on a freight train, alleged to have been caused by permitting two freight cars to run together so rapidly as to produce an unusual and unnecessary jolt, throwing plaintiff from his seat, a witness who has had long experience in the management of freight trains, and who was present at the time of the injury, may give his opinion that the car was not going faster than usual, that the jolt was not more than ordinary, and that the shock was not sufficient to throw a man unless he was standing. Ball v. Mabry, 91 Ga. 781, 18 S. E. 64. In an action for injuries to a passenger on a hand car which was thrown from the track, a fellow passenger may state his opinion that it was impossible for an ordinary person, sitting in plaintiff's position,

speed cannot be shown by the opinion of passengers observing only from the inside, unless their experience and observation are such as to make their judgment reliable.[5] A nonexpert witness who testifies to facts showing that a train stopped only momentarily, if at all, may then state his opinion that the train did not stop long enough for a passenger to alight.[6] So witnesses may give their opinion as to whether a passenger had time to get clear of a street car after she alighted, and before it started.[7] It has been held that, after testifying to the actual condition of the roadbed, a witness may state his opinion as to whether or not it was safe, though he is not an expert; [8] and that witnesses who were present at a railroad accident, or who examined the wreck, and saw the surroundings, may, after stating the facts, give their opinions as to what caus-

to stand the force of the jars and retain his seat in the car. His judgment or opinion of the effect of the concussion on an ordinary person would be the most efficient mode of enabling the jury to fully appreciate it, and give it its proper consideration in determining its influence in producing the injury. Healy v. Railroad Co., 101 Cal. 585, 36 Pac. 125.

[5] Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537. But a passenger on a train is competent to testify as to the distance it had gone from a station when it was stopped for the purpose of ejecting plaintiff, though the ejection occurred at night, and he did not observe external objects. St. Louis & S. F. Ry. Co. v. Brown (Ark.) 35 S. W. 225.

[6] Straus v. Railroad Co., 86 Mo. 422.

[7] Ward v. Railroad Co., 19 S. C. 521. But where the issue is as to whether the conductor gave the passenger a reasonable time within which to pay fare, evidence by the conductor that he gave plaintiff time enough to get the money is properly excluded as an opinion on the vital point in the case. Curl v. Railway Co., 63 Iowa, 417, 16 N. W. 69, and 19 N. W. 308.

[8] Missouri Pac. Ry. Co. v. Jarrard, 65 Tex. 560.

ed the derailment of the train.[9] So, a nonexpert witness, who was on the platform of a horse car at the time of a collision, may state whether, had the driver of the car been at his post, the car could have been stopped in time to have avoided the accident.[10]

But whether the structure of a railroad is such as to warrant fast travel is not usually a question for ordinary witnesses.[11] And the opinion of a witness whether an accident to a passenger in alighting happened by reason of defendant's failure to furnish lights is incompetent, as being on the very question which the jury is to pass on, viz. that of defendant's negligence.[12] So, it is error to permit witnesses to state their opinion

[9] Central R. v. Senn, 73 Ga. 705. A witness who has driven a span of horses on a street railroad both before and after an accident, caused, as claimed, by the vicious character of the horses, may give his opinion as to whether they were safe for that kind of work. Noble v. Railway Co., 98 Mich. 249, 57 N. W. 126. In an action for injuries to plaintiff's arm, which was struck by a mail crane, a witness, after describing the position of plaintiff's arm on the window sill, stated that he should judge that it was not outside of the car. Held, that such testimony was not merely an opinion, but a statement of fact, without a positive allegation as to its accuracy; but, even if regarded as an opinion, it was competent, as it was based on a special knowledge of the facts which had been testified to by the witness. Hallahan v. Railroad Co., 102 N. Y. 194, 6 N. E. 287.

[10] Howland v. Railway Co. (Cal.) 47 Pac. 255.

[11] Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

[12] Kelley v. Railroad Co., 80 Mich. 237, 45 N. W. 90. On an issue as to the condition of the light at defendant's station at the time plaintiff fell in alighting from a car, the opinion of a witness who had a general acquaintance with the station, and was there on the night in question, that it was not light enough to be reasonably safe, is not admissible, unless such witness testifies that he observed the condition of the light on the night of the accident, and states what that condition was. Chamberlain v. Platt (Conn.) 35 Atl. 780.

that a station platform is dangerous because of a descent of nine inches from one portion of it to another.[13] So, the opinion of a nonexpert witness that a jar on a freight train was harder than usual is of no value as evidence.[14] The question whether a locomotive engineer was acting properly in the line of his duty when he attempted to cross an intersecting track is one for the jury, and opinions of witnesses on an hypothetical statement of facts are not admissible.[15] A question asked of plaintiff on cross-examination whether the accident was not caused by his own fault and carelessness is objectionable, as calling for the opinion of the witness in reference to a matter which it is for the jury to determine, under a proper charge, from the facts proved.[16] So, in an action for compelling a passenger to jump from a moving train, the opinion of plaintiff

[13] Graham v. Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151.

[14] Guffey v. Railroad Co., 53 Mo. App. 462. It is improper to ask a witness whether a car was coupled in a negligent manner. Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111. In an action for injuries sustained in an attempt to board a moving electric street car, it is not error to exclude evidence that it was not the custom, and that people were not in the habit of trying, to get on cars moving at the rate of speed that the car was going; such testimony being, not that of a fact, but a conclusion. Citizens' St. R. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446. A witness cannot give his opinion as to whether a passenger exercised diligence in leaving a car at her destination. Madden v. Railway Co., 50 Mo. App. 666. Whether it is practicable for a person of ordinary activity to descend from the upper deck of a horse car without injury, while it is passing over a bridge, is not a question requiring special skill or knowledge, and should be determined by the jury, and not be referred to the opinion of witnesses. Baltimore & Y. T. Road v. Leonhardt, 66 Md. 70, 5 Atl. 346.

[15] Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135.

[16] H. & T. C. Ry. Co. v. Reason, 61 Tex. 613.

that he got off the train because he was in danger is inadmissible, but it is for the jury to say, from all the facts proved, why he got off.[17] So, in an action for the ejection of a passenger, the opinion of a witness that the conductor was anxious to have the matter settled, and conducted himself as well as a man could in such a case, is not admissible.[18] In an action for wrongfully revoking a pass good for 25 years, plaintiff cannot state his opinion as to the number of trips he would probably have taken over the road if it had not been revoked.[19]

Within the rule permitting opinion evidence, a witness may state the effect of a conversation on his mind, though he does not remember the language or form of expression; as that the general manager of a railroad reprimanded the section foreman for not inspecting the roadbed.[20]

[17] Hoehn v. Railway Co., 152 Ill. 223, 38 N. E. 549.

[18] Alabama G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236. "These were not shorthand rendering of facts, but patently the opinions and conclusions of the witness upon certain facts, which themselves should have been adduced in evidence, and upon which the jury alone were to pass judgment, and make up their opinion and conclusion as to whether the conductor was at fault in the premises immediately involved." Id.

[19] Kansas Gulf S. L. Ry. Co. v. Scott, 1 Tex. Civ. App. 1, 20 S. W. 725.

[20] Simpson v. Brotherton, 62 Tex. 172. "Where the impression received is vague and uncertain, the trial court might properly exclude the evidence; but where the defect is a failure to remember the exact words or forms of expression, while the impression or idea conveyed is distinct and clear, the evidence should be admitted." Id.

§ 466. SAME—AS TO INJURIES AND DAMAGES.

A nonexpert witness, who has described the condition of the injured person both before and after the accident, may give his opinion as to the health of such person.[1] Nor is it calling for an opinion, in the technical sense, to ask a nonprofessional witness how a person with whom he is intimately acquainted looked in respect to health at a certain time.[2] So, a witness who has stated what he observed as to the physical condition of plaintiff during several days after the injury may state that on the day following the injury plaintiff was worse.[3] The statement that an injured person was lamer in the morning than the day before is not a matter of opinion, but a statement

§ 466. [1] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 551, 14 N. E. 572, and 16 N. E. 197; Louisville, N. A. & C. Ry. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107; Winter v. Railway Co., 74 Iowa, 448, 38 N. W. 154.

[2] Cannon v. Railroad Co., 9 Misc. Rep. 282, 29 N. Y. Supp. 722.

[3] King v. Railroad Co., 75 Hun, 17, 26 N. Y. Supp. 973. A nonexpert witness who has described plaintiff's condition immediately after the accident and a month later, may state her opinion that plaintiff has grown worse during that time. Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 553, 14 N. E. 572, and 16 N. E. 197. Testimony by plaintiff's daughter that plaintiff was decidedly worse at the time of the trial than two months after the accident, and that plaintiff is not able to do as much work as before, is not incompetent as a mere expression of opinion, but falls within the rule that a witness may state the result of his observation. Parker v. Steamship Co., 109 Mass. 449. A nonexpert may testify to the comparative appearance of the eyes of an injured man before and after an injury. Sampson v. Railroad Co., 57 Mo. App. 308. A nonexpert may testify that he observed a cast in plaintiff's eye which was not there before the accident. Doyle v. Railway Co., 59 Hun, 625, 13 N. Y. Supp. 536.

of fact, and not objectionable.[4] Evidence as to plaintiff's situation the day after the accident, as to whether she had the use of her arm, and as to whether she was able to work, relates to facts, as to which nonexpert witnesses may testify.[5] So, a nonprofessional witness may give his opinion that plaintiff's mental condition was injuriously affected by an accident, in connection with a recital of facts on which he bases his opinion.[6] So, a nonexpert witness may testify that the injured person seemed to be suffering great pain. Evidence of this description is ordinarily more than a mere opinion, for the reason that emotions caused, either by distress or pleasure, usually exhibit themselves through the countenance, and the indications of their existence are as well defined and accepted by experience as when they may be expressed in the language of the person affected by them. It is not possible for a witness to describe either of these emotions by the em-

[4] Taylor v. Railway Co., 48 N. H. 304.

[5] Harris v. Railway Co., 76 Mich. 227, 42 N. W. 1111.

[6] Sharp v. Railway Co., 114 Mo. 94, 20 S. W. 93. After stating facts within the knowledge of the witness showing that plaintiff was seriously disabled by an injury, the witness may express his opinion that plaintiff, since the accident, has been unable to perform any duties which required the slightest physical exertion, that during his severest attacks he is unable to do anything, and that at his best he cannot do anything other than jobs of very light nature. Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848. One not an expert may testify whether it was necessary for a party to receive medical assistance, and the length of time such assistance was necessary. Chicago, B. & Q. R. Co. v. George, 19 Ill. 510. Nonexperts may properly testify as to plaintiff's condition and appearance before the accident, as to having recovered from former injuries. Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737.

ployment of language in such manner as to give evidence of their existence to the jury; and, when that is the fact, then the conclusion of the witness from the appearance of the person has been allowed to be stated.[7] But it is error to permit a nonexpert witness to state that plaintiff suffered in her head and stomach, since, as to these subjects, she can have no actual knowledge of her own, and no information, except from plaintiff's declarations, which are both hearsay and secondary evidence.[8]

A mother who has had experience in rearing and nursing children, and who has testified that a three months old babe was robust and vigorous when she started on a railroad journey; that the baby continued to be well until the conductor compelled her to go into a coach without fire on a cold day in February; that then its hands and feet got very cold, and it was taken sick and contracted a severe cold in the coach; and that it continued to grow worse and worse all the time thereafter, until it died, though it had the best of care and attention, and was not subjected to exposure afterwards,—may then state her opinion that the death was due to the exposure to cold in the coach.[9]

Plaintiff himself, though not an expert, may testify to the immediate physical consequences of an injury

[7] McSwyny v. Railroad Co., 54 Hun, 637, 7 N. Y. Supp. 456, citing Adams v. People, 63 N. Y. 621; People v. Eastwood, 14 N. Y. 562; McCarty v. Wells, 51 Hun, 171, 4 N. Y. Supp. 672.

[8] Lombard & S. S. Pass. Ry. Co. v. Christian, 124 Pa. St. 114, 16 Atl. 628.

[9] Ft. Worth & D. C. Ry. Co. v. Hyatt (Tex. Civ. App.) 34 S. W. 677.

received by him,[10] as that since the accident his health is constantly growing worse.[11] So, it is competent for plaintiff to testify as to the length of time he was confined to his bed, and to the pain suffered by him in consequence of the injury. Such testimony is not incompetent as stating the cause of being confined to his bed and of his suffering pain.[12] So, in an action for sickness alleged to have been caused by being set down away from a depot, plaintiff's testimony that "I know of nothing else that could have caused my illness, except the exposure to which I was subjected on the morning when I got off the train," is competent.[13]

But it is error to permit plaintiff to state as evidence his estimate of the amount of damages he has sustained on account of the injuries received.[14] He must state facts, and let the jury say from the facts what is the amount of the damages.[15] So, a father, suing for injuries to a minor son, cannot give his opinion as to how much he was damaged by his son's injuries.[16]

10 Bland v. Railroad Co., 65 Cal. 626, 4 Pac. 672.

11 Atchison, T. & S. F. Ry. Co. v. Click (Tex. Civ. App.) 32 S. W. 226. Plaintiff, whose jaw was fractured two years before the trial, may testify as to whether the injury is permanent. Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 9 South. 303.

12 North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

13 Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S. W. 993.

14 Ohio & M. R. Co. v. Nickless, 71 Ind. 271.

15 Central Railroad v. Senn, 73 Ga. 705. The opinions of witnesses in the same line of business as plaintiff, as to the amount of loss he sustained in his business by reason of the injuries, is incompetent. Lincoln v. Railroad Co., 23 Wend. (N. Y.) 425. This case illustrates the difficulties under which lawyers labored before parties were competent witnesses.

16 Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1.

But evidence as to the industrious habits, ability, and experience of plaintiff is within the rule permitting nonexperts to state their conclusions, if they state, as far as possible, the facts and observations on which they are based.[17] So, plaintiff may testify as to whether or not the injuries caused him to give up his business. This is a statement of fact, and not of opinion.[18]

§ 467. EXPERT EVIDENCE.

Where the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art, or trade to which the question relates are admissible in evidence.[1]

"The rule admitting the opinions of experts is founded on necessity, for juries are not selected with any view to their knowledge of a particular science, art, or trade, requiring a course of previous study, experience, and preparation." [2] Expert testimony begins with testimony "concerning those branches of business or occupations where some intelligence is requisite for

[17] Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343.

[18] Beckwith v. Railroad Co., 64 Barb. (N. Y.) 299. Plaintiff's opinion as to the value of his services as a farmer are admissible, based on his knowledge of what it cost him yearly for his living expenses, which he makes from his business. Arkansas Midland Ry. Co. v. Griffith (Ark.) 39 S. W. 550.

§ 467. [1] Rog. Exp. Test. § 6.

[2] Id.

judgment, and where opportunities of observation must be combined with practical experience." [3]

An "expert" has been defined by Mr. Rogers [4] "as one who is skilled in any particular art, trade, or profession, being possessed of practical knowledge concerning the same. Strictly speaking, an expert in any science, art, or trade is one who, by practice or observation, has become experienced therein." Thus railroad engineers and constructors are not the only persons competent to give an opinion in answer to the question how the derailment of cars on the inside of a curve, instead of the outside, can be accounted for. Prima facie, that question can be answered by any person acquainted with the elementary principles of mechanics, and claiming only to be an expert in that branch of science.[5] But a newspaper reporter, who has visited dozens of railroad accidents, and examined them for the purpose of reporting the probable cause, has been held incompetent to testify as an expert as to the cause of a broken rail which wrecked a passenger train.[6]

[3] Rog. Exp. Test. § 1.

[4] Id.

[5] Murphy v. Railroad Co., 66 Barb. (N. Y.) 125.

[6] Hoyt v. Railroad Co., 57 N. Y. 678. Where a witness is called and examined as an expert as to whether a steamboat was properly landed for the purpose of discharging a passenger, and as to what officers were required to man such a boat, it must appear, not only that the witness had sufficient knowledge and experience in reference to steamboating in general, but that he is acquainted with the class and dimensions of the boat, and the character and condition of the river and shore where the landing was made, or has heard the same described by witnesses in the case, before he can be allowed

Probably the largest class of expert witnesses called on to testify in courts is that of medical men. "The principle is well established that physicians and surgeons of practice and experience are experts in medicine and surgery, and that their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice." [7] A physician and surgeon, showing himself otherwise competent, is not disqualified from giving an opinion as an expert by the fact that, at the time of the occurrence in reference to which he is called on to testify, he was not in full practice. It is simply a matter for the jury in determining what weight should be given to his opinion.[8]

§ 468. SAME—ON WHAT SUBJECTS COMPETENT.

"It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it, than the jury; but, to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in

to express his opinions as an expert. Sebrell v. Barrows, 36 W. Va. 212, 14 S. E. 996.

[7] Rog. Exp. Test. § 42.

[8] Roberts v. Johnson, 58 N. Y. 613. The qualification of a witness to testify as an expert is a question for the trial court, whose decision will not be reversed on appeal unless it is manifestly against the weight of the evidence. Blondel v. Railway Co. (Minn.) 68 N. W. 1079. It is not error to rule out questions to expert witnesses put to show their experience in branches not essential to qualify them as witnesses in the case at bar. Brown v. Railroad (Sup.) 43 N. Y. Supp. 1094.

which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have." [1] Thus, in an action for injuries due to a collision of electric street cars, the manner of running the cars, their speed, and the facility with which they can be stopped, are proper subjects of expert testimony.[2] So, evidence by a civil engineer that a hole near a traveled way is a dangerous place, and needs protection, has been held competent.[3] So, expert testimony is admissible on the question whether or not the safety of people traveling on cable cars or vehicles requires that such cars should move forward on the signal of a flagman stationed at the intersection of two cable roads in the heart of a populous city.[4] But, in an action for injuries in a collision

§ 468. [1] Ferguson v. Hubbell, 97 N. Y. 507, 513.

[2] Howland v. Railway Co., 110 Cal. 513, 42 Pac. 983. In an action for injuries to a passenger on a steamer caused by the falling of an upper berth, expert evidence is competent as to the manner in which berths on steamers are generally constructed. Tinney v. Steamboat Co., 5 Lans. (N. Y.) 507.

[3] Cross v. Railway Co., 69 Mich. 363, 37 N. W. 361.

[4] Jackson v. Railway Co., 118 Mo. 199, 24 S. W. 192. "It cannot, we think, be said that the great mass of those who travel on these cars in our large cities know or trouble themselves much as to how these cables are managed, or that they have much conception of the number of cars that hourly cross an intersection like this in question, or of the danger that might attend the failure to have a common flagman to signal each train, or that danger would ensue from a disregard of the signals. We think it was a subject upon which the jury might well have been informed and enlightened by the evidence of one whose experience had taught him the necessity of an intelligent system of signals in moving so great a number of cars across a given point in a large city." Id.

between a street car and a truck at a street crossing, evidence as to the time and space within which a loaded truck can be stopped is barely competent.[5]

Generally, whether due care requires a certain thing to be done is not a question for expert testimony, but is for the jury to determine, upon the facts and circumstances of the case.[6] So, the opinion of an expert as to whether everything had been done that could have been done to avoid the accident is incompetent.[7] So, expert evidence that it was safe and proper for a street railway to operate an electric car with but one man in charge is not admissible in an action by a passenger who was in the car when it ran away on a downgrade while the man in charge was off the car, changing the trolley to another wire. This is a matter on which no special knowledge is required.[8]

[5] O'Neil v. Railroad Co., 129 N. Y. 125, 29 N. E. 84, affirming 59 N. Y. Super. Ct. 123, 15 N. Y. Supp. 84. "Jurors are generally well acquainted with such common things as trucks and horses, and the power, action, and capacity of horses, which, particularly in the city of New York, are constantly open to observation. Yet we cannot say that the expert witness did not know more about the subject of inquiry than ordinary jurors can be generally supposed to know." Id. Whether or not a wagon could have crossed a street car at a certain point without colliding with an approaching car is not the subject of expert testimony. Myer v. Railroad Co., 10 Misc. Rep. 11, 30 N. Y. Supp. 534.

[6] Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873.

[7] Fogel v. Railway Co. (Cal.) 42 Pac. 565.

[8] Redfield v. Railway Co., 112 Cal. 220, 43 Pac. 1117. The question whether a railroad train stopped an ample time for all the passengers to get off calls for an opinion on a matter not involving skilled testimony, and is improper. So, of the question whether it was safer to discharge passengers in a station or before reaching it.

The question of the earning power of an injured person is not one for expert testimony. An expert in banking or merchandising might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. The basis on which this calculation must rest is not the possibility, as judged of by the expert witness, but the cold, commonplace facts, as proved by those who knew them.[9]

§ 469. SAME—MEDICAL EXPERTS.

A medical expert who has examined plaintiff, and described his condition, may state his opinion as to what produced the symptoms described.[1] So, a physician may testify whether a cause which it is alleged existed would, in his opinion as a medical man, be sufficient to produce a condition which is claimed to have resulted from this cause.[2] So, in an action for per-

Keller v. Railroad Co., 2 Abb. Dec. 480, affirming 17 How. Prac. (N. Y.) 102.

[9] Goodhart v. Railway Co., 177 Pa. St. 1, 35 Atl. 191. See, also, post, § 525.

§ 469. [1] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 553, 14 N. E. 572.

[2] Lacas v. Railway Co., 92 Mich. 412, 52 N. W. 745.

sonal injuries sustained in a railroad collision, a physician who knows plaintiff's condition may give his opinion as to whether her injuries are such as would likely result from such a concussion as was shown.[3] So, in an action for putting a six-year old child off a train, about half a mile from the depot, where plaintiff claims to be suffering from heart disease as a result of the fright suffered when ejected, it is competent for medical experts to testify whether fright will produce the heart trouble with which plaintiff was said to be afflicted.[4] On the same principle, a medical expert, after testifying to his personal observation of the patient, to the fact of injury, and to her subsequent condition, may give his opinion as to whether the injury was the cause of the subsequent condition.[5]

In an action for personal injuries, all damages, past

[3] Texas Cent. Ry. Co. v. Burnett, 80 Tex. 536, 16 S. W. 320. Plaintiff may give evidence of his physical condition and bodily sufferings, with the opinions of physicians as to whether such condition would have resulted from the accident. McDonald v. Railroad Co., 13 Misc. Rep. 951, 34 N. Y. Supp. 921.

[4] Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7. Where a person is buried in the wreck of a train, and is doubled up with his breast towards his knees, and sustains injuries to his spinal column, it is competent to ask a physician who has examined him whether the doubling of the plaintiff in the manner described by him would be the probable cause of his condition. Beckwith v. Railroad Co., 64 Barb. (N. Y.) 299. In an action for personal injuries sustained by a fall from a street car, it is competent for a physician to state that the injuries were such as could have been produced by the fall, and that they were permanent. Montgomery v. Railroad Co., 55 Hun, 611, 8 N. Y. Supp. 811.

[5] Stouter v. Railway Co., 127 N. Y. 661, 27 N. E. 805, affirming 53 Hun, 634, 6 N. Y. Supp. 163.

and prospective, must be recovered in the one action. Hence it is competent to prove by medical experts the probability that the injury will permanently impair the health and physical or mental ability of plaintiff,[6] and the probability of the continuance of the injuries or of a recovery therefrom.[7] So, where plaintiff's physician testifies fully in regard to her condition, and the disease from which she is suffering, resulting, as claimed, from the injuries received, it is competent for him to state, from his experience, practice, and observation, what percentage of persons in plaintiff's condition recover their health, the question having a direct bearing on the permanency of the disease.[8]

But there is an obvious difference between an opin-

[6] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 422, 3 N. E. 389, and 4 N. E. 908. A physician who has attended an injured person for two years may give his opinion as to whether her ailments are permanent. Brown v. Railroad Co., 18 Misc. Rep. 584, 42 N. Y. Supp. 700.

[7] Griswold v. Railroad Co., 115 N. Y. 61, 21 N. E. 726, affirming 44 Hun (N. Y.) 236; Johnson v. Railroad Co., 53 Hun, 633, 6 N. Y. Supp. 113, affirmed 125 N. Y. 702, 26 N. E. 752; King v. Railroad Co., 75 Hun, 17, 26 N. Y. Supp. 973; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269. In support and in confirmation of an opinion expressed by a physician that plaintiff will not get well, it is competent to prove by him—after he has stated her symptoms, and the causes which, in his opinion, produced them—at what period after the injury plaintiff would be most likely to begin to improve, if she were going to improve at all. Matteson v. Railroad Co., 62 Barb. (N. Y.) 364. An expert witness may give his opinion as to the result of a disease in its natural and ordinary course, to wit, that plaintiff will never get any better, and never be able to straighten his limbs. Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35, affirming 43 Hun (N. Y.) 321.

[8] Cole v. Railway Co., 95 Mich. 77, 54 N. W. 638.

ion as to the permanence of a disease or injury already existing, capable of being examined and studied, and one as to the merely possible outbreak of new diseases or sufferings having their cause in the original injury. In the former case, where disease or injury and its symptoms are present and existing, their indications are more or less plain and obvious, and from their severity or slightness a recovery may reasonably be expected, or the contrary; while an opinion that some new and different complication will arise is merely a double speculation,—one that it may possibly occur, and the other that if it does it will be a product of the original injury, instead of some other new and perhaps unknown cause.[9] Hence the New York courts hold that a medical witness cannot testify as to the "probable" future effect of personal injuries, but that he must state that they are reasonably certain to occur.[10] But in other jurisdictions medical witnesses may testify as to the probable results that would follow from a specified injury, though merely speculative opinions are not competent.[11] But medical testi-

[9] Griswold v. Railroad Co., 115 N. Y. 61, 21 N. E. 726, affirming 41 Hun (N. Y.) 236.

[10] O'Brien v. Railroad Co., 59 Hun, 623, 13 N. Y. Supp. 305; Atkins v. Railway Co., 57 Hun, 102, 10 N. Y. Supp. 432. Evidence as to future possible consequences of personal injuries is not admissible. Lewis v. Railroad Co., 7 Misc. Rep. 286, 27 N. Y. Supp. 889.

[11] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 558, 14 N. E. 572; Cunningham v. Railroad Co., 49 Fed. 439. A physician of experience, who attended plaintiff in his sickness caused by personal injuries, may state his opinion as to the effect of the injuries on plaintiff's future condition. Toledo, W. & W. Ry. Co. v. Baddeley, 54 Ill. 19.

mony as to the possible effect on plaintiff's health of provoking language or vexatious circumstances is out of place in an action for an assault on a passenger consisting in the conductor's placing his hands on his shoulders, with a threat to remove him from the car.[12]

An expert witness who has described the nature of the injuries may state his conclusion that the physical defects which he found could not have been produced by simulation.[13] But evidence of a physician, who had known plaintiff for some years, that, in his opinion, she was "shamming before the jury," has been held incompetent. A physician is no better qualified to give an opinion on that subject than are jurors, who observe the actions and appearance of the witness on the stand and in the court room.[14]

Medical experts testifying as to the nature and extent of plaintiff's injuries, based on a personal exami-

[12] Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580.

[13] Harrold v. Railroad Co., 47 Minn. 17, 49 N. W. 389. So, the attending physician may testify that, from his examination and tests, he knows the patient was not feigning pain. Chicago, B. & Q. R. Co. v. Martin, 112 Ill. 16.

[14] Cole v. Railway Co., 95 Mich. 77, 54 N. W. 638. A physician who has examined a fractured leg eleven months before the trial, and has testified that it was then one inch shorter than the other, should not be allowed to state his opinion that its natural tendency would be to continue to shorten, and that it was shorter at the time of the trial than on the examination, since this is a fact susceptible to observation, and capable of proof by a re-examination of the leg. Kummer v. Railroad Co. (Com. Pl.) 20 N. Y. Supp. 116. An expert who has testified that the stiffness of plaintiff's arm could probably be cured by a painful and dangerous surgical operation cannot be asked if he himself would submit to such an operation. Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363.

nation, may be asked whether the examination was made in a superficial or in a careful and thorough manner.[15] So, in an action for personal injury resulting in paralysis of a limb, a medical expert may state that some of his own limbs are paralyzed, as adding strength to his testimony as an expert, in being calculated to excite in him a peculiar interest, and lead him to give special study to that subject of inquiry.[16] So, the testimony of physicians, who examined plaintiff's limb and broken bones, as to the details of such examination, are competent. They need not be confined to a statement of the results of their examination.[17] So, an expert medical witness may state, not only his opinions as to the nature of the injuries, but the grounds of his opinion, based on cases on record.[18]

§ 470. SAME—MEDICAL OPINIONS BASED ON STATEMENTS MADE OUT OF COURT.

We have seen that a witness not an expert can testify only to such complaints or exclamations of a sick man as indicate present pain. But a medical expert

[15] Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840. A physician cannot testify to his opinion as to what ails a patient, where it is the result of a very superficial examination made as auxiliary to a lawsuit, and where not given in answer to hypothetical questions based on facts. Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537. But evidence of a physician as to the extent and nature of plaintiff's injuries is not rendered incompetent because based on an ex parte examination made some years after the accident. The objection on this ground goes to the weight of his evidence, and not to his competency. Mississippi & T. R. Co. v. Ayres, 16 Lea (Tenn.) 725.

[16] Chicago W. D. R. Co. v. Lambert, 119 Ill. 255, 10 N. E. 219.

[17] Sherwood v. Railway Co., 88 Mich. 108, 50 N. W. 101.

[18] Healy v. Railroad Co., 101 Cal. 385, 36 Pac. 125.

may form and express an opinion based in part on the statements of the sick person, made while being treated professionally, in relation to his present condition, suffering, or symptoms, and the physician may testify to such statements as part of the evidence of the investigation and inquiry upon which his opinion is based. The evidence of such declarations is received from necessity, because it is the only way in which the bodily condition of the patient can in many cases be fully ascertained.[1] But a physician, testifying as an expert, cannot substitute for his own opinion the statement of

§ 470. [1] Johnson v. Railroad Co., 47 Minn. 430, 50 N. W. 473; Jones v. Railway Co., 43 Minn. 279, 45 N. W. 444; Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284; Atchison, T. & S. F. Ry. Co. v. Click (Tex. Civ. App.) 32 S. W. 226. Where the inquiry is as to the extent of certain alleged personal injuries, a physician may be called as an expert to testify concerning them, giving his opinion based upon a personal examination of the party, as well as upon statements made by such party as to his present condition, feelings, and pain; and may also give in evidence such statements. But the physician may not testify as to what the party said in respect to the past history of the case, and the cause or duration of the injury; neither can he give an opinion based partially upon his personal examination and partially upon what the party told him in reference to the past history of the case, and also upon statements of a third person in the presence of the party in reference thereto. Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463. Where plaintiff, in an action for personal injuries, is examined by a board of surgeons, some of whom are selected by herself and some by defendant, such surgeons, in testifying to the nature of plaintiff's ailments, may take into consideration, not merely the physical appearance of plaintiff at the time of the examination, but also her statements as to the existence of pain made in reference to questions directed to her. It would have presented a different question if the plaintiff, on her part, without the knowledge or presence of witnesses for the defendant, had called experts to examine her as to her present condition, for the purpose of

plaintiff as to the cause of his illness. To permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent.[2] Nor is it competent for a medical expert to give in evidence an opinion as to the cause of a person's physical condition or injuries, based in part upon information which he has derived from private conversations with a third person.[3]

§ 471. SAME—EXAMINATION OF EXPERTS.

In propounding a hypothetical question to an expert witness on his examination in chief, counsel may assume such facts, within the range of the evidence, as he believes the evidence tends to establish. The hypothesis need not include the substance of all the evidence.[1] But a hypothetical question which as-

giving evidence on the trial, and not for the purpose of giving medical advice. Quaife v. Railway Co., 48 Wis. 513, 4 N. W. 658. See, also, ante, § 456.

[2] Illinois Cent. R. Co. v. Sutton, 42 Ill. 438. In this case plaintiff had been ejected from a train, and had been compelled to walk two miles to a station. Held, that testimony by a physician that plaintiff had told him that the illness was caused by the overexertion in walking was incompetent.

[3] Miller v. Railway Co., 62 Minn. 216, 64 N. W. 554. See, also, Rog. Exp. Test. § 46.

§ 471. [1] Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 554, 14 N. E. 572; Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908; Filer v. Railroad Co., 49 N. Y. 42. Where

sumes, as one of the facts, the opinion of another physician, is incompetent. An opinion cannot rest, in whole or in part, upon other opinions, but must rest on facts.[2] So, questions to an expert, calling for his opinion on the evidence, and requiring him to weigh it before the questions are answered, are incompetent.[3]

For convenience, instead of embodying the facts in a hypothetical question, the court may, and often does, permit the hypothesis to be put by referring the

an opinion is sought from a physician as an expert, it is not necessary that the facts on which it is based should be stated in the question, when they have just been stated by the witness, and are understood by him and the jury. McDonald v. Railroad Co., 88 Iowa, 345, 55 N. W. 102. Where a medical expert has obtained knowledge of the facts of the case by an examination of the party, and has stated such facts to the jury, it is proper to incorporate in a hypothetical question to him the result of the knowledge thus obtained. Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908. Where a physician has testified as an expert that he had examined and failed to discover the alleged injury (fracture of the femur), he may be asked whether or not such an injury might exist without his being able to discover it. Quaife v. Railway Co., 48 Wis. 513, 4 N. W. 658. In order to obtain the opinion of witnesses on matters not depending on general knowledge, but on facts not testified to by himself, either the witness must be present, and hear all the testimony, or the testimony must be summed up in the question put to him; and in either case the question should not be whether defendant was negligent, but what was defendant's duty under the circumstances specified. Sebrell v. Barrows, 36 W. Va. 212, 14 S. E. 996.

[2] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 421, 3 N. E. 389, and 4 N. E. 908.

[3] Loveless v. Railway Co., 57 N. Y. Super. Ct. 3, 5 N. Y. Supp. 185; Uransky v. Railroad Co., 59 Hun, 625, 13 N. Y. Supp. 670. But a physician called as an expert to answer a hypothetical question involving matters in evidence may, in answering it, introduce incidents from his own knowledge and experience. Taft v. Railroad Co., 14 Misc. Rep. 330, 35 N. Y. Supp. 1042.

witness to the testimony if he has heard it, instead of stating the facts. But in such case the witness' question must require the witness to assume the testimony to be true, and not leave it for him to determine whether any of it be true or not, for that would commit to him the function of the jury.[4] Hence a medical expert should not be permitted to give his opinion based on all the evidence in the case, where that evidence is contradictory.[5]

In cross-examining an expert, counsel have a right to assume the facts as they believe them to exist, and to ask the expert's opinion upon the facts thus assumed. An examination in chief cannot be so conducted as to compel the cross-examining counsel to merely

[4] Jones v. Railway Co., 43 Minn. 279, 45 N. W. 444. A medical expert who has heard plaintiff give part of her testimony in court, and then heard the balance of her testimony read by the court reporter, may give his opinion, assuming such testimony to be true. McKeon v. Railway Co. (Wis.) 69 N. W. 175. Where the opinion of an expert is asked on facts not detailed in the question itself, but appearing in the testimony of another, to which the expert is referred, it must appear that he heard such testimony. Howland v. Railway Co. (Cal.) 47 Pac. 255. A physician may state his opinion based on the symptoms which he has observed, and which he has detailed to the jury, without having these symptoms and observations embodied in a hypothetical question. Niendorff v. Railway Co., 4 App. Div. 46, 38 N. Y. Supp. 690.

[5] Kreuziger v. Railway Co., 73 Wis. 158, 40 N. W. 657. In Connelly v. Railway Co., 60 Hun, 495, 15 N. Y. Supp. 176, it was said, with reference to this method of examination: "This practice, however, which is usually resorted to for the purpose of facilitating the progress of the trial, can only be justified where no objection is made. The party against whom the evidence is offered is entitled, if he so desires, to have an explicit statement made to or by the expert witness of the precise state of facts upon which his opinion is based."

follow the line of questions there asked; but, when a general subject is opened by an examination in chief, the cross-examining counsel may go fully into details, and may put the case before the expert witness in various phases.[6] So, on the cross-examination of an expert witness, counsel may be permitted, for the purpose of testing his skill and accuracy, to ask him hypothetical questions, pertinent to the inquiry, assuming facts having no foundation in the evidence.[7]

It is generally held that evidence as to the statements of medical books or authors is inadmissible, either on the examination in chief or on the cross-examination.[8] "The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony is that the science of medicine is not an exact science." [9]

[6] Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 402, 420, 3 N. E. 389, and 4 N. E. 908.

[7] Williams v. Railway Co. (Minn.) 70 N. W. 860.

[8] Kreuziger v. Railway Co., 73 Wis. 158, 40 N. W. 657; Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; City of Bloomington v. Shrock, 110 Ill. 219; Fisher v. Railroad Co., 89 Cal. 399, 26 Pac. 894.

[9] Union Pac. Ry. Co. v. Yates, 25 C. C. A. 103, 79 Fed. 584.

§ 472. PRIVILEGED COMMUNICATIONS.

Professional communications between attorney and client are privileged at common law.[1] This rule has been enacted into a statute in all the states, and the attorney cannot testify to such communications without the client's consent. To constitute professional employment, within the meaning of such a statute, it is not necessary that any retainer should have been paid, promised, or charged for. An attorney is employed in his professional capacity when he is voluntarily listening to his client's preliminary statement, or giving advice thereon, even though he should, after hearing such statement, decline to be retained further, or the client, after hearing the attorney's advice, should decline to further employ him. A breach of professional relations between attorney and client does not of itself remove the seal of silence from the lips of the attorney in respect to matters communicated in confidence.[2]

Communications by a patient to his physician for the purpose of obtaining medical treatment were not privileged at common law,[3] but have been made so by statute in probably all the American states. The fact that the physician was employed and paid for by de-

§ 472. [1] 1 Greenl. Ev. § 237.

[2] Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

[3] 1 Greenl. Ev. § 248. A statement by an injured person to a physician as to how the injury occurred, made in response to a question asked by the physician, is a confidential communication, and cannot be disclosed without the patient's consent. Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973.

fendant does not prevent the privilege from attaching, where the relation of physician and patient actually exists.[4] But a physician in the employ of a railroad company, who calls on an injured person for the sole purpose of procuring for the company exact information of the extent of the injury, and the circumstances of the accident, and who gives the injured person no reason to believe that he intends to render her any professional services, is not within the prohibition of the statute.[5] So, if parties sustaining confidential relations, as physician and patient, hold their conversation in the presence of third persons, whether they be necessarily present as officers or as indifferent bystanders, such third persons are not prohibited from testifying as to what they heard.[6]

This privilege attaching to professional communications may be waived by plaintiff,[7] or by his attorney acting as his agent.[8] An interesting question on the

[4] New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, and 38 N. E. 871; Raymond v. Railway Co., 65 Iowa, 152, 21 N. W. 495.

[5] Heath v. Railroad Co., 57 N. Y. Super. Ct. 496, 8 N. Y. Supp. 863; Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730. But where such physician continues his visits, and prescribes for the patient, his information so acquired is privileged, and he should not be permitted to testify, against plaintiff's objection. Id.

[6] Springer v. Byram, 137 Ind. 15, 36 N. E. 361. A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to the suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter. Brown v. Railroad Co., 66 Mo. 588.

[7] Blair v. Railroad Co., 89 Mo. 334, 383, 1 S. W. 367.

[8] Alberti v. Railroad Co., 118 N. Y. 77, 23 N. E. 35, affirming 43 Hun (N. Y.) 421.

subject of waiver has arisen where a patient is treated by two physicians, and one of them is called as a witness in his favor. Does this act also waive the privilege as to the other? The supreme court of Missouri has held that it does not; [9] but the New York court of appeals [10] has held that by calling one of two physicians who attended on plaintiff, and by examining one of them as to what took place at a joint consultation, the patient waives the privilege, not only as to the one who has been called as a witness, but also as to the other, and defendant may put him on the stand and examine him as to what took place at that consultation. "By putting one of the physicians on the stand, plaintiff completely uncovered and made public what before was private and confidential. It amounted to a consent on his part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts, and one part removed and the other retained."

[9] Mellor v. Railway Co., 105 Mo. 455, 16 S. W. 849.

[10] Morris v. Railway Co., 148 N. Y. 88, 42 N. E. 410, reversing 73 Hun, 560, 26 N. Y. Supp. 342.

CHAPTER XXXIV.

EVIDENCE (Continued)—WEIGHT AND SUFFICIENCY.

§ 473. Burden of Proof.
474. Same—As to Breach of Duty.
475. Same—As to Damages and Injuries.
476. Same—Contributory Negligence.
477. Degree of Proof.
478. Judicial Notice.
479. Presumption of Being Passenger.
480. Presumption of Negligence—Happening of Accident.
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483. Same—Collision.
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485. Same—Defective Roadbed and Machinery.
486. Same—Concussion of Cars, and Jars of Trains and Boats.
487. Same—Injuries to Passengers While Embarking and Alighting.
488. Same—Falling Objects and Missiles.
489. Same—Death of Passenger.
490. Same—Other Cases Where Presumption has Obtained.
491. Same—Other Cases Where Presumption has not Obtained.
492. Same—Contributory Negligence.
493. Same—Persons not Passengers.
494. Same—Rebutting the Presumption.
495. Same—Rule in Texas.
496. Same—Statutory Presumptions.
497. Credibility of Witnesses.
498. Same—Contradictory Statements.
499. Same—Falsus in Uno, Falsus in Omnibus.
500. Positive and Negative Testimony.
501. Failure to Call Witness.
502. Weighing Expert Evidence.
503. Conflict of Evidence—Province of Jury.
504. Same—Between Witnesses for Same Party.

§ 505. Same—Sufficiency of Evidence as to Relationship of Carrier and Passenger.
506. Same—Taking Case from Jury.
507. Same—Duty of Judge on Motion for New Trial.
508. Same—On Appeal.

§ 473. BURDEN OF PROOF.

The burden of proof rests on plaintiff to show:

(1) A breach of some specific duty which the carrier owes him.

(2) Injury or damage resulting to him as a proximate consequence of the breach of duty.

In all actions by passengers against common carriers, "the plaintiff has to prove—First, that there was on the part of the defendant a neglect of that duty cast upon him under the circumstances; and, second, that the damage he has sustained was the consequence of that neglect of duty." [1]

§ 474. SAME—AS TO BREACH OF DUTY.

To maintain an action to recover damages for negligence, plaintiff must prove facts warranting an inference of negligence on the part of defendant; he may not recover on facts as consistent with care and prudence as with the opposite. On the whole case, it is incumbent on plaintiff to establish negligence by a preponderance of the evidence.[1] Hence evidence that

§ 473. [1] Per Blackburn, J., in Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 208.

§ 474. [1] Hayes v. Railroad Co., 97 N. Y. 259; Holbrook v. Railroad Co., 12 N. Y. 236; Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind.

a passenger sitting in an open street car fell out, as the car was turning a curve at a low rate of speed, and making only an ordinary jar, and that he almost immediately expired, is not sufficient evidence of negligence to go to the jury.[2]

This rule of the common law as to the burden of proof of negligence has, however, been modified by statute in Georgia and Florida. In these states it is enacted that a railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that

264, 273, 3 N. E. 836; Southern Kan. Ry. Co. v. Walsh, 45 Kan. 653, 659, 26 Pac. 45; Chicago, St. L. & N. O. R. Co. v. Trotter, 60 Miss. 442.

[2] Muller v. Railroad Co., 48 N. Y. Super. Ct. 546. Where the testimony of a passenger and his witnesses leaves it in doubt whether he fell off or was pushed off the car, and also leaves it in doubt (if he was pushed off) whether the conductor or some third person pushed him off, there being no evidence to clear up the doubt, plaintiff cannot recover. Pixley v. Railroad Co., 33 N. Y. Super. Ct. 406. The mere fact that a boy riding on the front platform of a street car was seen by a witness in the act of falling from the platform, and that he was run over and killed by the car, is not sufficient to establish negligence. Payne v. Railroad Co., 40 N. Y. Super. Ct. 8. While riding in one of defendant's horse cars, plaintiff was injured in consequence of a runaway team of horses running into the rear of the car in which he was sitting. It was proved that the runaway horses had been worked together for more than six weeks before the accident, and had given entire satisfaction, and were considered perfectly safe. It appeared that their driver was not in good health, but there was nothing to show that his disease was such a one as prevented him from performing his duties as driver. Held, that there was no evidence of negligence. Quinlan v. Railroad Co., 4 Daly (N. Y.) 487.

their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.[3]

In the absence of such a statute, not only must plaintiff prove negligence on the part of defendant, but he must also show that defendant was under the duty of exercising care towards him. Hence, where it is denied by a railroad company that plaintiff was on the train when injured, and the conductor and trainmen deny having seen him there, plaintiff must prove, by a fair preponderance of the evidence, that he was a passenger, and not a trespasser hiding away from the train hands.[4]

So, the fact of being carried past a passenger's destination does not of itself establish a presumption that the carrier has failed in the performance of his duty, but the burden is on plaintiff to show either that the train did not stop, or that it did not stop long enough to enable him, by the use of reasonable diligence, to leave the car in safety.[5]

[3] Code Ga. 1882, § 3033, originally enacted in 1855; Laws Fla. 1890–91, c. 4071, § 1.

[4] Pfaffenback v. Railway Co., 142 Ind. 246, 41 N. E. 530.

[5] Hewes v. Railroad Co., 76 Md. 154, 24 Atl. 325. The court said: "When a carrier undertakes to transport goods to a certain point, he is bound to deliver them at the designated place, and if he fails to do so he is in default. He has broken his contract, in that he has not done that which he undertook to do. But there is no such absolute and unconditional duty to discharge passengers at their destination. He must, of course, inform them that the end of their journey has been reached, and he must afford them proper and reasonable means and facilities for departing in safety from the vehicle of transportation. The traveler is possessed of volition, and he may not choose to leave the vehicle; or he may, through negligence and

§ 475. SAME—AS TO DAMAGES AND INJURIES.

The burden is on plaintiff to show the extent of his injuries which were caused by defendant's breach of duty.[1] Where the great pressure of the case is on the question whether the child of deaf and dumb parents was deprived of the sense of hearing by an injury received at the hands of defendant when it was under two months of age, it devolves on plaintiff to show that the child was not deaf before the injury, or was not born deaf. A charge that, if "the evidence be equally balanced for plaintiff and defendant on any contested point, they should find that part of the case in favor of defendant," is not erroneous.[2]

inattention, disregard the opportunity to leave which has been given him. It cannot be said that the carrier is bound to eject him, or to insist on his leaving the vehicle against his will."

§ 475. [1] Gulf, C. & S. F. Ry. Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66; Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357.

[2] Davis v. Railroad, 60 Ga. 329. A passenger train broke through a trestle. The sleeper in which plaintiff was riding dipped over the break at an angle of 45 deg., but so gently as not even to break or put out the lamps in the car. Plaintiff was sleeping when the accident occurred, and, on leaving the car, said he was uninjured, and declined medical assistance. Weeks later he became sick. The physicians disagreed as to the nature of the ailment,—his testifying that it was spinal meningitis, the defendant's, that it was malaria. At the trial plaintiff was well. Held, that no injury had been established for which a recovery could be had. Richmond & D. R. Co. v. Moffett, 88 Va. 785, 14 S. E. 370. Where the issue is as to whether plaintiff's illness was caused by defendant's act in carrying her past her station, and thus exposing her to inclement weather, plaintiff is bound to show affirmatively that the sickness resulted from the exposure, and the burden rests on her throughout the trial. St. Louis, A. & T. Ry. Co. v. Burns, 71 Tex. 479, 9 S. W. 467. Where

§ 476. SAME—CONTRIBUTORY NEGLIGENCE.

As to the burden of proof on the issue of contributory negligence, the authorities are hopelessly divided. One class of authorities holds that the burden of proving contributory negligence rests on defendant. After a plaintiff, in an action for personal injuries, proves affirmatively that they were caused by defendant's negligence, it is not necessary for him to prove negatively that he himself was not guilty of any negligence that contributed to the result.[1] As the love of life and the instinct of self-preservation are the highest motives for care in any reasoning being, they will stand as proof

plaintiff's nose was injured in a railroad accident, and it appears that he never had catarrh before, but had it soon afterwards, the jury is warranted in finding that the catarrh is the result of the injury, on medical evidence that catarrh might be produced by an injury to the surface of the nose, though no instance of the kind is on record. Quackenbush v. Railway Co., 73 Iowa, 458, 35 N. W. 523. A train was partially derailed, the day coach leaving the track and being partially turned on its side. A passenger in the day coach, who was not thrown from his seat, left the car, and assisted other passengers in other coaches. He repeatedly declared, in describing the accident, that he was not hurt, though a discoloration subsequently appeared on his back. Both before and after the accident he had been suffering from hemorrhoids and la grippe, and after the accident his condition became worse, and he died six months thereafter. He never made any claim against the railroad company, and his attending physician did not know that he was in the wreck until after his death. Held, that the question whether his death was due to spinal injuries received in the wreck was for the jury, and their finding that it was would not be disturbed. Atchison, T. & S. F. R. Co. v. Elder (Kan. Sup.) 46 Pac. 310.

§ 476. [1] Bradwell v. Railway Co., 139 Pa. St. 404, 20 Atl. 1046.

of care until the contrary appears.[2] But, since the rule rests on this presumption of care, it can have no application where plaintiff's own evidence shows a want of care contributing to the injury; and in such a case defendant may avail himself of plaintiff's evidence on this point, without introducing any further evidence. But, even in such a case, contributory negligence must appear by a preponderance of the testimony. This is the rule which obtains in the federal courts of this country,[3] in Alabama,[4] Arkansas,[5] California,[6] Colorado,[7] Maryland,[8] Minnesota,[9] Missouri,[10] Nebraska,[11] Pennsylvania,[12] Texas,[13] Washington,[14]

2 Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393, 399.

3 Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. Ct. 557.

4 Watson v. Land Co., 92 Ala. 320, 8 South. 770; North Birmingham St. Ry. Co. v. Calderwood, 89 Ala. 247, 7 South. 360; Thompson v. Duncan, 76 Ala. 334; McDonald v. Railway (Ala.) 20 South. 317.

5 Little Rock & Ft. S. Ry. v. Atkins, 46 Ark. 423; Texas & St. L. Ry. v. Orr, Id. 182; Little Rock & F. S. Ry. Co. v. Cavenesse, 48 Ark. 106, 2 S. W. 505.

6 May v. Hanson, 5 Cal. 360; Robinson v. Railroad Co., 48 Cal. 409; McQuilken v. Railroad Co., 50 Cal. 7; Id., 64 Cal. 463, 2 Pac. 46.

7 Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632.

8 County Com'rs of Prince George's Co. v. Burgess, 61 Md. 29; Bacon's Case, 58 Md. 484.

9 Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. 333.

10 Swigert v. Railroad Co., 75 Mo. 475; Fulks v. Railway Co., 111 Mo. 335, 19 S. W. 818.

11 Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007.

12 Mallory v. Griffey, 85 Pa. St. 275, and cases supra.

13 Gulf, C. & S. F. Ry. Co. v. Shieder, 88 Tex. 152, 162, 30 S. W. 902; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038; Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427; Texas & P. Ry. Co. v. Murphy, 46 Tex. 356.

14 Spurrier v. Railway Co., 3 Wash. 659, 29 Pac. 346; Bailey v.

West Virginia,[15] Wisconsin,[16] the District of Columbia,[17] as well as in England [18] and in Canada.[19] It also obtains in North Carolina by force of a statute.[20]

But in other jurisdictions the rule is that the burden is on plaintiff to show, by a preponderance of the testimony, that, at the time of the accident, he was in the exercise of due care. "The burden is held to be on plaintiff, for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to wit, that the injury to the plaintiff was caused by the negligent or wrongful conduct of defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as by affirmative testimony. All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either by acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault." [21] "But, if there is only a par-

Traction Co. (Wash.) 47 Pac. 241; Vasele v. Railway Co. (Wash.) 48 Pac. 249.

[15] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571; Riley v. Railroad Co., 27 W. Va. 146; Snyder v. Railroad Co., 11 W. Va. 14.

[16] Hoth v. Peters, 55 Wis. 405, 13 N. W. 219.

[17] Harmon v. Railroad Co., 7 Mackey, 255.

[18] Wakelin v. Railway Co., 12 App. Cas. 41; Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 208.

[19] Morrow v. Railway Co., 21 Ont. App. 149; Cornish v. Railway Co., 23 U. C. C. P. 355.

[20] Acts N. C. 1887, c. 33. Held valid in Wallace v. Railroad Co., 104 N. C. 442, 10 S. E. 552.

[21] Mayo v. Railroad, 104 Mass. 137.

tial disclosure of the facts, and no evidence is offered showing the conduct of the person injured in regard to matters specially requiring care on his part, the data for such an inference are not sufficient. It can only be warranted when circumstances are shown which fairly indicate care, or exclude the idea of negligence on his part." [22] This is the rule in Illinois,[23] Indiana,[24] Iowa,[25] Maine,[26] Massachusetts,[27] Michigan,[28] and New York.[29]

[22] Hinckley v. Railroad Co., 120 Mass. 257. If the legal effect of facts shown in plaintiff's testimony creates a presumption of negligence on her part, the burden is on her to show, by a preponderance of the evidence, the existence of other facts to control and wholly remove such presumption,—to disprove contributory negligence. New York, C. & St. L. Ry. Co. v. Woods, 9 Ohio Cir. Ct. R. 322.

[23] Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Hawk v. Railroad Co., 147 Ill. 399, 35 N. E. 139; North Chicago St. Ry. Co. v. Louis, 138 Ill. 9, 27 N. E. 451; Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63. It was at one time held that a different rule prevailed as to passengers, and that the burden was on defendant.. Galena & C. U. R. Co. v. Yarwood, 17 Ill. 509. But this case is overruled by the later cases cited above.

[24] Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343; Toledo, W. & W. Ry. Co. v. Brannagan, 75 Ind. 490; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32.

[25] Bonce v. Railway Co., 53 Iowa, 278, 5 N. W. 177, and 27 N. W. 466; Raymond v. Railway Co., 65 Iowa, 152, 21 N. W. 495; Kellow v. Railway Co., 68 Iowa, 470, 23 N. W. 740.

[26] State v. Maine Cent. R. Co., 76 Me. 364.

[27] Peverly v. City of Boston, 136 Mass. 366; Wheelwright v. Railroad Co., 135 Mass. 225; Chaffee v. Railroad Corp., 104 Mass. 108; Gaynor v. Railroad Co., 100 Mass. 208; Lane v. Crombie, 12 Pick. (Mass.) 177.

[28] Gardner v. Railway Co., 99 Mich. 182, 58 N. W. 49; Mynning v. Railroad Co., 67 Mich. 677, 35 N. W. 811; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440, 447.

[29] Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. 101; Lee v. Gaslight

In Florida, it has been held that where a passenger, who knows of a rule requiring him to ride in passenger cars, rides in an express car or other place on the train which cannot be regarded as intended for accommodation of passengers, but naturally suggests that it is not intended for them, the burden is on him to prove that he was justified in riding in such prohibited place.[30]

§ 477. DEGREE OF PROOF.

The party upon whom rests the burden of proof in a civil action is not bound to establish a case free from reasonable doubt; he performs his obligation by presenting a preponderance of the evidence. This rule applies to actions for negligence.[1]

Co., 98 N. Y. 115. In New York, where plaintiff is bound to prove freedom from contributory negligence, the case cannot be submitted to the jury if there is no evidence on the question of contributory negligence. So, where it appears that a person in ascending the stairway leading to an elevated railroad station fell across the railing and was killed, there can be no recovery. McMahon v. Railroad Co., 50 N. Y. Super. Ct. 507.

[30] Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506.

§ 477. [1] Seybolt v. Railroad Co., 95 N. Y. 562, affirming 31 Hun (N. Y.) 100; Quaife v. Railway Co., 48 Wis. 513, 4 N. W. 658. An instruction that the jury should feel reasonably certain as to what caused a railroad wreck does not require plaintiff to make out his case by more than a preponderance of the proof, where the judge further charges that in civil cases the jury does not arrive at conclusions beyond a reasonable doubt. Beery v. Railway Co., 73 Wis. 197, 40 N. W. 687. In charging juries in civil cases, the word "satisfy" should not be used in such connection that it may be taken to mean that a verdict cannot be given on a preponderance of the evidence. Arkansas M. Ry. Co. v. Canman, 52 Ark. 517, 13 S. W.

"Preponderance of evidence" is correctly defined to be "such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury." It is not a technical term at all, but means simply that evidence which outweighs that which is offered to oppose it. It does not necessarily mean that a greater number of witnesses shall be produced on one side or the other; but that, upon the whole evidence, the jury believe the greater probability of the truth to be upon the side of the party having the affirmative of the issue.[2]

§ 478. JUDICIAL NOTICE.

Courts take judicial notice of certain facts, without any evidence being introduced to prove them. It has been held that courts will take judicial notice of what everybody knows with regard to the ordinary incidents of railway travel.[1] Thus courts take judicial notice of the functions of such railway officers as ticket agents

280. Though Code Civ. Proc. Cal. § 1826, requires plaintiff to prove his case to a moral certainty, as distinguished from absolute certainty, and by that degree of proof which produces conviction in an unprejudiced mind, the court need not instruct that an injured passenger must establish the carrier's negligence "to a moral certainty." Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266.

[2] Strand v. Railway Co., 67 Mich. 386, 34 N. W. 712. Preponderance of evidence does not mean such evidence as "satisfies" the mind of its truth, but simply the greater weight of evidence. Bryan v. Railway Co., 63 Iowa, 464, 19 N. W. 295.

§ 478. [1] Frederick v. Railroad Co., 37 Mich. 347; Downey v. Hendrie, 46 Mich. 498, 9 N. W. 828; Baltimore & Y. Turnpike Road v. Cason, 72 Md. 377, 20 Atl. 113; Siner v. Railway Co., L. R. 4 Exch. 123; Dublin, W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155.

and conductors, as matters of common experience, and passengers are supposed, on the same grounds, to know their functions, and the regulations of the companies to which they trust themselves.[2]

§ 479. PRESUMPTION OF BEING PASSENGER.

If a person, not connected with the company, travels by a passenger train, presumably he is traveling as a passenger, and for a consideration; in other words, he is presumed to have paid his fare, or to be ready to pay it when called upon.[1] But this presumption does not apply to the case of a train, manifestly designed for the carriage of freight, even if such train does have attached to it a caboose, as such vehicles are necessary for the accommodation of the employés of the company, and are usually used for this purpose only. The fact that a person, not an employé, killed in a railroad accident, was found in the caboose attached to a freight train, is not sufficient of itself to warrant the court in assuming that the company had undertaken, as to him, the duties and obligations of a carrier of passengers. In the absence of proof to the contrary, the presumption is that he was not a passenger.[2]

[2] Dye v. Railroad Co., 20 D. C. 63, 77.

§ 479. [1] Creed v. Railroad Co., 86 Pa. St. 139; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 346. The fact that the agent of a stage-coach company directed the driver to let plaintiff alight at a certain place prima facie establishes plaintiff's rights as a passenger. Thorne v. Stage Co., 6 Cal. 232.

[2] Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185.

§ 480. PRESUMPTION OF NEGLIGENCE—HAPPENING OF ACCIDENT.

A presumption of negligence arises against a carrier whenever it is shown that an injury has been produced to a passenger, without fault on his part, either:

(1) By the breaking down or failure of the carrier's vehicle, roadway, or other appliances of transportation; or

(2) By an error of the carrier or its servants in operating them.[1]

In all other cases, the mere fact of injury to a passenger does not give rise to a presumption of negligence against the carrier.

As a general rule, in an action grounded on negligence, plaintiff does not sustain the burden of proof by showing merely that he was injured through some defect in a machine owned by defendant, but he must go further, and prove that defendant was negligent in permitting the defect to exist; as, that he knew of the defect, or that he ought to have known of it, in the exercise of ordinary care and skill. A different rule, however, obtains if the relation of passenger and carrier existed between the parties at the time of the accident. In such a case, proof that the injury was caused by a defect in the appliances of transportation is sufficient to take the case to the jury on the issue of defendant's negligence.

§ 480. [1] Dougherty v. Railroad Co., 9 Mo. App. 478, per Thompson, J.

Three distinct reasons are assigned for this exception in favor of the passenger. One is the existence of a contract relation between the parties, and the resulting duty of the carrier to exercise the highest degree of practicable care and skill to transport the passenger safely. "A coach runs against a cart; the cart is damaged, the coach is upset, and a passenger in the coach is hurt. The owner of the cart must prove that the driver of the coach was in fault. But the passenger in the coach can say to the owner: 'You promised for gain and reward to bring me safely to my journey's end, so far as reasonable care and skill could attain it. Here am I, thrown out on the road with a broken head. Your contract is not performed; it is for you to show that the misadventure is due to a cause for which you are not answerable.'" [2] "The rule requiring the highest degree of care, etc., would be of little practical value, if it were not enforced in judicial administration by a correlative rule of evidence." That rule is that when an injury has been shown to be occasioned by a defect in the instrumentalities of transportation, or by an error of the carrier or his servants in operating them, a presumption of negligence arises against the carrier, sufficient to take the case to the jury.[3]

The second reason is the principle first laid down by Erle, C. J., in the following language: "There must be reasonable evidence of negligence. But where the

[2] Pol. Torts, p. 548.

[3] Madden v. Railway Co., 50 Mo. App. 666; Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. 333; Baltimore & O. R. Co. v. State, 63 Md. 135.

thing is shown to be under the management of defendant or his servants, and the accident be such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." [4] This principle has been applied with full force in cases of injuries to passengers, where it is shown that the vehicle, conveyance, or roadbed which broke down was under the exclusive control or management of the carrier or his servants.[5]

A third reason assigned is that, "from the very nature of things, the means of proving the specific facts are more in the power of the carrier. The latter, owning the property, and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of an accident which he might be interested to withhold, and which the passenger could not know, and might be himself unable to prove." [6]

In some of the earlier cases on the subject it was said that the mere happening of an accident raises a prima facie presumption of neglect, and throws upon

[4] Scott v. Docks Co., 3 Hurl. & C. 601. In this case, plaintiff, while lawfully on defendant's dock, was struck by a bag of sugar that defendant's servants were hoisting by means of a crane. It was held that the happening of the accident was evidence of negligence, and that it was error to direct a verdict for defendant.

[5] Dougherty v. Railroad Co., 81 Mo. 325; Feital v. Railroad Co., 109 Mass. 398; Breen v. Railroad Co., 109 N. Y. 297, 16 N. E. 60; Caldwell v. Steamboat Co., 47 N. Y. 282, affirming 56 Barb. (N. Y.) 425; Curtis v. Railroad Co., 18 N. Y. 534, affirming 20 Barb. (N. Y.) 282; Grant v. Railroad Co., 108 N. C. 462, 13 S. E. 209.

[6] Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827.

the carrier the onus of showing that it did not exist.[7] But this view is now universally abandoned. "The rule of Laing v. Colder [8] and other like cases, that a presumption of negligence on the part of the carrier arises when a passenger is injured in the course of transportation, cannot be invoked without evidence tending to connect the carrier, or its employés, or some of the appliances of transportation, with the happening of the injury." [9] A prima facie case of negligence

[7] Laing v. Colder, 8 Pa. St. 479; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 471, 17 Ill. 509.

[8] 8 Pa. St. 481.

[9] Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14. The mere fact of injury to a person while a passenger on defendant's road does not establish a prima facie case of negligence. It must further appear that the injury was produced either by breaking down or failure of the carrier's vehicle or other physical appliance, or by an error of the carrier or his servants in operating them. Jacquin v. Cable Co., 57 Mo. App. 320. Where the injury occurs by reason of any defect in the machinery or cars or apparatus or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of vis major, or the tortious act of a stranger, tending to produce the accident, no such prima facie case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. Chicago City Ry. Co. v. Rood (Ill. Sup.) 45 N. E. 238. A presumption of negligence does not follow the simple and unexplained fact of an injury to a passenger while riding on a train, but the cause, or at least the nature of the accident resulting in the injury, must be shown, for it is upon the character or nature of the accident that a presumption of negligence must rest. Saunders v. Railway Co., 6 S. D. 40, 60 N. W. 148. "It has been held in some of the states that, in cases of injuries on railroads, there is always

is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger; and that it was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of passengers. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further, and show the particular defect or cause of the accident until the presumption is rebutted.[10] So, a similar presumption arises when an injury to a passenger is shown to have been occasioned by an error of the carrier or his servants in operating the instrumentalities employed in the business of carrying.[11]

§ 481. SAME—ACCIDENTS ON ROAD VEHICLES.

The upsetting of a stagecoach, producing injury to a passenger, is prima facie evidence of negligence, and throws on defendant the burden of proving that the

a presumption of negligence against defendant. That, however, is not the common law, and is not the law of this state. According to the doctrine which we follow, negligence must be shown in all such cases, and it must appear to have been the efficient cause of the injury, without contributory fault in plaintiff." Mitchell v. Railway, 51 Mich. 236, 16 N. W. 388.

[10] Wall v. Livezay, 6 Colo. 465. See, also, Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722; Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. (Va.) 394. Where an accident happens to a passenger on a railway, either by the carriage breaking down or running off the rails, that is prima facie evidence of negligence on the part of the company. Such evidence, if not rebutted by evidence on the company's part, will justify a verdict against the company. Dawson v. Railway Co., 5 Law T. (N. S.) 682.

[11] Condy v. Railway Co., 85 Mo. 79.

accident was not caused by his negligence or that of his driver.[1] The leading case on this subject is Christie v. Griggs,[2] decided in 1809. In this case plaintiff proved that he was a passenger on defendant's stagecoach; that the axletree snapped asunder at a place where there was a slight descent; that he was in consequence precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed. He then rested his case. Defendant's counsel contended strenuously that plaintiff was bound to proceed further, and give evidence either of the driver being unskillful, or of the coach being insufficient. But Sir James Mansfield, C. J., said: "When the breaking down or overturning of a coach is proved, negligence is implied. He has always means to rebut this presumption, if it be unfounded, and it is now incumbent on defendant to make out that the damage in this case arose from what the law considers a mere accident." The coming off of a wheel,[3] or the breaking of a wheel [4] or an axle,[5] producing injury to a pas-

§ 481. [1] Stokes v. Saltonstall, 13 Pet. 181; McKinney v. Neil, 1 McLean, 540, Fed. Cas. No. 8,865; Farish v. Reigle, 11 Grat. (Va.) 697; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2. The overturning of a sleigh on a smooth and level road, with good sleighing, while running at the rate of six miles an hour, establishes a prima facie case of negligence against the carrier. Ryan v. Gilmer, 2 Mont. 517.

[2] 2 Camp. 79.

[3] Ware v. Gay, 11 Pick. (Mass.) 106; Gunn v. Dickson, 10 U. C. Q. B. 461.

[4] Lawrence v. Green, 70 Cal. 417, 11 Pac. 750.

[5] Lemon v. Chanslor, 68 Mo. 340. Where an accident is occasioned by the uncoupling of a stagecoach, and its precipitation into the river, while being driven onto a ferryboat forming part of its

senger in the coach, is prima facie evidence of negligence; and so is the overturning of the coach by the failure of the driver to keep the road on a bright moonlight night.[6] So, the fact that a driver of a stagecoach leaves his team with passengers aboard standing near a railroad train, and that the horses, frightened by the locomotive whistle, run away, and injure a passenger, is sufficient evidence of negligence to go to the jury.[7] So, evidence that the horses ran and kicked, and that the driver lost all control over them, raises a presumption that defendant, in disregard of its duty, provided wild and unsafe horses, and a careless and incompetent driver.[8]

§ 482. SAME—DERAILMENT OF CAR OR TRAIN.

Evidence that a passenger was injured by the derailment of a car or train in which he was lawfully riding makes out a prima facie case of negligence against the carrier.[1] Experience proves that when

route, the happening of the accident is prima facie evidence of negligence on the part of the carrier. McLean v. Burbank, 11 Minn. 277 (Gil. 189).

[6] Boyce v. Stage Co., 25 Cal. 460.

[7] Wall v. Livezay, 6 Colo. 465.

[8] Budd v. Carriage Co., 25 Or. 314, 35 Pac. 660.

§ 482. [1] Little Rock & Ft. S. Ry. v. Miles, 40 Ark. 298; Eureka Springs Ry. v. Timmons, 51 Ark. 459, 11 S. W. 690; St. Louis & S. F. Ry. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Denver, S. P. & P. Ry. Co. v. Woodward, 4 Colo. 1; Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Yonge v. Kinney, 28 Ga. 111; Peoria, P. & J. R. Co. v. Reynolds, 88 Ill. 418; Pittsburg, C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138; Chicago, P. & St. L. Ry. Co. v. Lewis, 48 Ill. App. 274; St. Louis C. R. Co. v. Moore, 14 Ill. App. 510;

the track and machinery are in good condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on board. Whenever a car or train leaves the track, it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that defendant, whose duty it is to keep the track and machinery in proper condition, and to operate it with necessary prudence and care, has, in some respect, violated this duty.[2]

Of course, the presumption is all the stronger when some additional defects are proven, as the breaking of a rail [3] or the misplacing of a switch;[4] or where the rot-

Ohio & M. Ry. Co. v. Voight, 122 Ind. 288, 23 N. E. 774; Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 273, 3 N. E. 836; Pittsburgh, C. & St. L. R. Co. v. Williams, 74 Ind. 462; Missouri Pac. Ry. Co. v. Johnson, 55 Kan. 344, 40 Pac. 641; Southern Kan. Ry. Co. v. Walsh, 45 Kan. 653, 659, 26 Pac. 45; Atchison, T. & S. F. R. Co. v. Elder (Kan. Sup.) 46 Pac. 310; Stevens v. Railway, 66 Me. 74; Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. 333; Furnish v. Railway Co., 102 Mo. 438, 13 S. W. 1044; Hipsley v. Railroad Co., 88 Mo. 348; Norton v. Railway Co., 40 Mo. App. 642; Dimmitt v. Railroad Co., Id. 654; Haderlein v. Railroad Co., 3 Mo. App. 601; Edgerton v. Railroad Co., 39 N. Y. 227; Webster v. Railroad Co., 85 Hun, 167, 32 N. Y. Supp. 590; Dampman v. Railroad Co., 166 Pa. St. 520, 31 Atl. 244; Dayton v. Railroad Co., 1 C. P. Rep. (Pa.) 9; Carpue v. Railway Co., 5 Q. B. 747; Flannery v. Railway Co., 11 Ir. R. C. L. 30.

[2] Edgerton v. Railroad Co., 39 N. Y. 227; Stevens v. Railway, 66 Me. 74.

[3] Cleveland, C., C. & I. Ry. Co. v. Newell, 75 Ind. 542; George v. Railway Co., 34 Ark. 613; Arkansas M. Ry. Co. v. Griffith (Ark.) 39 S. W. 550; Brignoli v. Railway Co., 4 Daly (N. Y.) 182.

[4] Baltimore & O. R. Co. v. Worthington, 21 Md. 275; New York, L. E. & W. R. Co. v. Daugherty, 11 Wkly. Notes Cas. (Pa.) 437.

ten condition of the ties,[5] or the giving way of the spikes fastening the rails to the ties,[6] combine, with the high speed of the train, in producing the derailment. So, the fact that a car is twice derailed within a short distance shows prima facie negligence on the part of the carrier in permitting such a car to be used for carrying passengers.[7]

By the weight of authority, the derailment of a street car, resulting in injury to a passenger, likewise raises a presumption of negligence against the carrier, and the burden is on it to rebut the presumption.[8]

But the supreme court of New York has recently held that the derailment of a street car does not give rise to a presumption of negligence. It would be grossly unjust to extend that rule to street-railway companies, which have no exclusive control over the track or roadway, but whose tracks are daily used by thousands of other vehicles, and are placed in public streets under the control of the city authorities, and in which work is constantly being done on or under the roadway and tracks.[9]

[5] Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343.

[6] Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476. So, evidence that at the time of the derailment the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed, throws on defendant the burden of disproving negligence. Mitchell v. Railroad Co., 87 Cal. 62, 25 Pac. 245.

[7] Texas & St. L. Ry. Co. v. Suggs, 62 Tex. 323.

[8] Spellman v. Rapid-Transit Co., 36 Neb. 890, 55 N. W. 270; Louisville & P. R. Co. v. Smith, 2 Duv. (Ky.) 556; Elgin City Ry. Co. v. Wilson, 56 Ill. App. 364; Cincinnati St. Ry. Co. v. Kelsey, 9 Ohio Cir. Ct. R. 170.

[9] Hastings v. Railroad Co., 7 App. Div. 312, 40 N. Y. Supp. 93.

§ 483. SAME—COLLISION.

A collision between two trains running on the same track at a high rate of speed does not ordinarily occur without mismanagement or want of care on the part of the carrier, and the happening of such an accident, producing injury to a passenger, is prima facie evidence of negligence.[1] A similar presumption of negligence arises from a collision of two electric street or cable cars;[2] and also from the unexplained presence of a freight car on the main track in the nighttime, where it collides with an approaching passenger train;[3] and similarly from the fact that a train runs off the main track onto a side track, collides with ob-

§ 483. [1] Graham v. Railway Co., 39 Minn. 81, 38 N. W. 812; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 274; Louisville, N. A. & C. Ry. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Flinn v. Railroad Co., 1 Houst. (Del.) 469, 504; Iron R. Co. v. Mowery, 36 Ohio St. 418; Skinner v. Railway Co., 5 Exch. 786. Where a stationary train owned by defendant, on which plaintiff is a passenger, is run into by another train, through the negligence of the train hands of the moving train, it must be presumed, though other railways have running powers over defendant's road, that the moving train was either owned by defendant or under its control, in the absence of evidence to the contrary. Ayles v. Railway Co., L. R. 3 Exch. 146. Evidence that the conductor of one of the colliding trains was a man of intemperate habits raises a presumption of negligence. Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[2] Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. 860; North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Id., 41 Ill. App. 311; North Chicago St. R. Co. v. Boyd, 57 Ill. App. 535.

[3] Webster v. Railroad Co., 115 N. Y. 112, 21 N. E. 725, affirming 40 Hun (N. Y.) 161.

structions standing thereon, and is thrown from the track.[4]

Injury to a passenger in a collision between his train and that of another company at an intersecting crossing raises a presumption of negligence against the company carrying him;[5] and so does a collision between a street car and an engine or a train at an intersecting crossing.[6] But no such presumption obtains as against the noncarrying company, and a preponderance of the evidence must show that it was guilty of negligence contributing to the injury.[7]

It seems that no presumption of negligence against the carrier arises from the mere fact of a collision between a street car and a vehicle in a crowded city street;[8] nor from the fact that a passenger on a street

[4] Seybolt v. Railroad Co., 95 N. Y. 562, affirming 31 Hun (N. Y.) 100. Where a street car is derailed, and comes into collision with a freight car standing on another track, close to the street-car track, injuring a passenger, the presumption of negligence arises; and, to escape liability, the carrier must show that the injury did not result from its negligence, or that it could have been avoided by the exercise of ordinary care on the part of the passenger. North Baltimore Pass. Ry. Co. v. Kaskell, 78 Md. 517, 28 Atl. 410.

[5] Clark v. Railroad Co., 127 Mo. 197, 29 S. W. 1013.

[6] Chicago City Ry. Co. v. Engel, 35 Ill. App. 490; People's Pass. Ry. Co. v. Weiller (Pa. Sup.) 2 Atl. 510. A collision between a street car, in which a passenger is riding, and another car, at a crossing with an intersecting road, raises a presumption of negligence against the carrier. Loudoun v. Railroad Co. (Sup.) 44 N. Y. Supp. 742.

[7] Railway Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Central Pass. Ry. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441; Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165.

[8] Potts v. Railway Co., 33 Fed. 610. The concurrent facts of the happening of an accident to a passenger on a street car and the exercise by the passenger of ordinary care do not raise a presump-

car is struck by a passing load of hay.[9] But where a street car, driven with unusual speed, collides with a truck, the pole of which penetrates through the front of the car, throwing plaintiff from her seat and injuring her, it is not a reasonable or natural inference that such an accident happens without some carelessness on the part of the driver; and the driving at an unusual rate of speed is inferentially one cause or occasion of the accident, calling for an explanation, and requiring a submission of the case to the jury.[10]

Injury to a passenger caused by his train coming in contact with a landslide on the track raises a presumption of negligence, and the burden is on defendant to show that the landslide was an act of God.[11] So, where a passenger is injured by a collision of his train with an animal on the track, a presumption of negligence arises against the carrier.[12]

Where a passenger, without fault on his part, is injured in a collision between his car and some object

tion of negligence against the carrier, so as to shift the burden of proof on it to show that it was not guilty of negligence, where plaintiff's evidence shows that the accident was due to a wagon driven so close to an open car as to strike plaintiff's foot. Chicago City Ry. Co. v. Rood (Ill. Sup.) 45 N. E. 238, reversing 62 Ill. App. 550.

[9] Federal St. & P. V. Ry. Co. v. Gibson, 96 Pa. St. 83.

[10] Hill v. Railroad Co., 109 N. Y. 239, 16 N. E. 61.

[11] Gleeson v. Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859; reversing 5 Mackey (D. C.) 356.

[12] Louisville & N. R. Co. v. Ritter's Adm'r, 85 Ky. 368, 3 S. W. 591; Louisville, N. A. & C. Ry. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58; Sullivan v. Railroad Co., 30 Pa. St. 234; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280. The contrary was held in Patchell v. Railway Co., 6 Ir. R. C. L. 117, but this decision is manifestly wrong.

outside of the car on the track or right of way of the company, a presumption of negligence arises against the company.[13] Piling rock so near a railroad track as to scrape against a passenger train, injuring a passenger therein, raises a presumption of negligence against the carrier.[14] So, where a passenger's arm is broken while her train is passing cars standing on a side track near by, and it appears that a long horizontal mark was left on the car by some object scraping it, the presumption of negligence arises; and the burden rests on the carrier to show that the accident happened without fault on its part.[15]

A prima facie case of negligence is made out by showing that a passenger was killed in a collision between two steamers, both of which were owned by the carrier, at a point in the river where the boats were

[13] Cincinnati, H. & D. R. Co. v. Brown, 9 Ohio Cir. Ct. R. 198. But no such presumption of negligence arises if the passenger was guilty of contributory negligence in protruding his arm outside of the car. See post, § 492.

[14] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571.

[15] Hollbrook v. Railroad Co., 12 N. Y. 236, affirming 16 Barb. (N. Y.) 113. A passenger on a train, while sitting by an open window, with his arm resting on the sill, but not protruding therefrom, was struck on the arm and injured by a swinging door on a passing freight train, which also struck and bruised other cars in the passenger train. No explanation of the accident was given by defendant. Held, that a want of proper care on defendant's part was to be presumed, and a recovery by plaintiff was proper. Breen v. Railroad Co., 109 N. Y. 297, 16 N. E. 60. Where a passenger train is struck by an iron bar projecting five or six feet from a construction train moving in the opposite direction, and a passenger is injured, the presumption is that the carrier was negligent in his manner of carrying the bar. Walker v. Railway Co., 63 Barb. (N. Y.) 260.

accustomed to pass each other, and where the river was wide enough to permit such passage with the exercise of proper care.[16]

§ 484. SAME—EXPLOSIONS.

The explosion of the boiler of a locomotive at a depot, resulting in injury to a person about to take the train as a passenger, is prima facie evidence of negligence,[1] and so is the explosion of a steamboat boiler, injuring a passenger.[2] It has even been held that injury to a passenger on an omnibus, by the explosion of a lamp therein, is sufficient to make out a prima facie case of negligence against the carrier.[3] But the explosion of a fog signal on a railroad track, injuring a passenger on the station platform, is not sufficient to render the company liable, since such signal may have been placed there by a stranger to the company.[4]

§ 485. SAME—DEFECTIVE ROADBED AND MACHINERY.

The washing away of a railroad embankment, causing a disaster to a passenger train, is prima facie evidence of negligence against the company.[1] So, the

[16] Sherlock v. Alling, 44 Ind. 184, 204.

§ 484. [1] Yeomans v. Navigation Co., 44 Cal. 71. So, if the explosion injures a person about to take passage on another road. Illinois Cent. R. Co. v. Phillips, 49 Ill. 234, 55 Ill. 194.

[2] Dunlap v. The Reliance, 2 Fed. 249; Spear v. Railroad Co., 119 Pa. St. 61, 12 Atl. 824, affirming 5 Pa. Co. Ct. R. 393.

[3] Wilkie v. Bolster, 3 E. D. Smith (N. Y.) 327.

[4] Jones v. Railway Co., 45 U. C. Q. B. 193.

§ 485. [1] Great Western Ry. Co. v. Fawcett, 1 Moore, P. C. (N. S.) 101; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442; Philadelphia & R.

breaking down of a railroad bridge while a passenger train is crossing it, producing injury to passengers, gives rise to a presumption of negligence against the carrier.[2] But, where plaintiff's evidence shows that the embankment was washed out by a rainstorm of extraordinary violence, the burden rests on him to show that, notwithstanding the operation of the act of God in the case, the negligence of defendant caused the injury, or actively co-operated with the act of God to produce it.[3]

The breaking of one of the links of a wrought-iron brake chain in a street car, causing a collision with another car in front, and an injury to a passenger, raises an inference that the link broke on account of some defect or flaw which would have been revealed by a proper inspection.[4] Proof that the brakes on a cable car were insufficient to hold it in going down hill, and that injuries to a passenger resulted in consequence thereof, makes a prima facie case for plaintiff.[5]

R. Co. v. Anderson, 94 Pa. St. 351; Brehm v. Railway Co., 34 Barb. (N. Y.) 256.

[2] Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357; Bedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 551; Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284; Rice v. Railroad Co., 22 Ill. App. 643.

[3] Gillespie v. Railway Co., 6 Mo. App. 554.

[4] Wynn v. Railroad Co., 133 N. Y. 575, 30 N. E. 721.

[5] Sharp v. Railway Co., 114 Mo. 94, 20 S. W. 93. Inability to control the speed of a cable car while going down a steep hill is prima facie evidence of negligence; and coupled with the fact that a known defect in the grip existed before the train left the power house warrants a finding of negligence. Bishop v. Railway Co., 48 Minn. 26, 50 N. W. 927.

So, the breaking of the paddle wheel of a steamboat,[6] or of the apparatus used to hold a hawser in place while warping a vessel around before landing,[7] or of a halyard while hoisting the steamer's masthead light,[8] raises a presumption of negligence against the carrier, if injury to a passenger is thereby produced.

The supreme court of Michigan, however, has held that the mere fact that an air cock has been turned, by reason of which the air brakes fail to work, and the train runs past the usual stopping place, is not evidence of negligence, since it may have been turned by accident which could not have been foreseen, or by some third person for whose acts defendant cannot be held liable.[9]

§ 486. SAME—CONCUSSION OF CARS AND JARS OF TRAINS AND BOATS.

On the question whether a presumption of negligence arises from the fact that a passenger was injured by a concussion of cars, or by jolts or jerks of the train, during transportation, the authorities are not quite uniform. On principle, however, it would seem that the presumption should arise in all cases where the jerk or jolt is unusual and violent, and the facts do not give rise to an inference of contributory negligence on the part of the passenger. Unless

[6] Yerkes v. Packet Co., 7 Mo. App. 265.

[7] Miller v. Steamship Co., 118 N. Y. 199, 23 N. E. 462.

[8] The Wasco, 53 Fed. 546.

[9] Porter v. Railway Co., 80 Mich. 156, 44 N. W. 1054. In most of the states, however, it would devolve on defendant to show the facts exonerating it. See post, § 494.

there is some error on the part of the carrier's servants in operating the train, concussions and jolts severe enough to injure a passenger do not usually occur. It has accordingly been held that the fact that an injury results, without fault on his part, to a passenger on a regular passenger train, from a concussion of two cars with the train, is prima facie evidence of negligence on the part of the company, and the burden is upon it to prove that the accident was not occasioned by the fault of its agents.[1] So, the fact that a passenger in a caboose is thrown down and injured by a concussion of a freight car while in the act of being coupled to the caboose raises a presumption of negligence against the carrier.[2] So, an injury to a drover on a train as a passenger, while descending a ladder of a car, caused by the cars being shoved together so as to crush him, raises a presumption of negligence against the carrier.[3] But in Pennsylvania it has been held that the fact that a car, on being coupled to a train on which plaintiff was a passenger, was permitted to run against the train with such violence that plaintiff was thrown forward against the seat, and injured, does not raise a presumption that defendant was negligent, but plaintiff must prove that the coupling

§ 486. [1] Goble v. Railroad Co., 10 Fed. Cas. 502. Negligence is presumed from the fact that the cars and engine of a passenger train became uncoupled, and that a collision between the cars and the engine occurred, resulting in the death of a passenger. Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

[2] Georgia Pac. Ry. Co. v. Love, 91 Ala. 432, 8 South. 714.

[3] New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809.

was negligently made.[4] This decision seems to be placed on the ground that the presumption of negligence arises only when the injury is caused by some defect in the means of transportation, and not by an error in operating them.

An injury to a passenger, caused by a sudden lurch or jolt of the train, is prima facie evidence of negligence, if the passenger was in the exercise of ordinary care.[5] Thus, where there is a jolt of the train at its landing place, while running at a low rate of speed, throwing a passenger from his seat, and immediately thereafter the train comes to a standstill close to sta-

[4] Herstine v. Railroad Co., 151 Pa. St. 244, 25 Atl. 104. A drover accompanying cattle on a freight train stood up in the caboose to wash himself at an intermediate station, when he knew that other cars were about to be coupled to the train, and he was thrown down by the force of the concussion. Held, that the mere fact of the accident was not sufficient to show negligence by defendant. Hutchinson v. Railway Co., 17 Ont. 347, affirmed 16 Ont. App. 429. It should be noted that in this case an inference of contributory negligence could be drawn.

[5] Railroad Co. v. Pollard, 22 Wall. 341. The fact that a passenger is injured, while traveling on a train, by a series of severe jolts, is prima facie evidence of negligence, throwing on the carrier the burden of showing that the injury could not have been prevented by the exercise of the utmost care and diligence on its part. Baltimore & P. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175. Evidence that a passenger, on his way from his seat to the water-closet, was thrown out of the open car door by a sudden and violent jerk of the train, makes a prima facie case of negligence. Lavis v. Railroad Co., 54 Ill. App. 636. Evidence that the car gave several jolts as it was approaching a depot, that a grinding noise under the wheels was heard, that the car seemed to be lifted off the track, and that plaintiff was thrown from her seat and injured, is sufficient prima facie evidence of negligence to warrant the submission of the case to the jury. Murphy v. Railroad Co., 36 Hun (N. Y.) 199.

tionary buffers, the happening of the accident is evidence of negligence, since it was the engineer's duty to come up to the buffers so as not to rebound.[6] An injury to a passenger, without fault, caused by the sudden stopping of the train, makes a prima facie case of negligence.[7]

So, the fact that a passenger's hand is injured by the slamming of a car door, owing to a violent jerk of the train as she is about to leave the car, raises a presumption of negligence against the carrier.[8] But such a presumption does not arise from evidence that while standing at the open door of a passenger coach as the train was approaching plaintiff's station "there was a fearful shock," causing him to fall and suffer injury, with nothing to show or even suggest the nature of the shock, or whether it involved the train or the car in which he was, or was simply personal to himself.[9]

[6] Burke v. Railroad Co., 22 Law T. (N. S.) 442. Where it is announced that a train will stop at a station 10 minutes for refreshments, a sudden jerk of the train, after it has come to a stop, so severe as to throw against a seat and severely injure a passenger who has arisen in her seat, is prima facie negligence on the part of the company. Glidden v. Railroad Co., 20 N. Y. Wkly. Dig. 313.

[7] Guffey v. Railway Co., 53 Mo. App. 467. So held where, by a sudden checking of the movement of a train, a passenger was thrown through an open door onto the car platform, and from the platform to the track. Coudy v. Railway Co., 85 Mo. 79; Id., 13 Mo. App. 587, 588.

[8] Kentucky & I. Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. 338. The sudden stopping of a passenger train, slamming the open door against the hand of a passenger who has thrown her hand against the jamb of the door to steady herself, establishes a prima facie case of negligence. Madden v. Railway Co., 50 Mo. App. 666.

[9] Saunders v. Railway Co., 6 S. D. 40, 60 N. W. 148.

As to sudden jerks and jolts on street cars, it has been held that injury to a passenger on a street car, by a sudden jar or plunge which affects all the passengers, and believed by plaintiff to be due to the fact that the car left the track temporarily, raises a presumption of negligence.[10] So, where a cable car is stopped so suddenly as to throw a passenger from her seat, and to break the glass in the car windows, a presumption of negligence arises against the company.[11] But where a passenger riding on the front platform of a street car falls off by reason of his feet slipping, and the ordinary motion of the car, no presumption of negligence arises against the company.[12] So, the fact that a passenger is thrown from a street car while rounding a curve does not give rise to a presumption of negligence against the carrier.[13]

Where a ferryboat is driven so hard against the land

[10] Dixey v. Traction Co. (Pa. Sup.) 36 Atl. 924.

[11] Clow v. Traction Co., 158 Pa. St. 410, 27 Atl. 1004. Running a train of street cars rapidly down an incline, and then stopping it suddenly and violently, throwing a passenger against a seat, injuring her, is prima facie evidence of negligence. West Chicago St. R. Co. v. Kennelly, 66 Ill. App. 244.

[12] Baltimore & Y. Turnpike Road v. Cason, 72 Md. 377, 20 Atl. 113. The mere fact that an electric street car gives a sudden jerk when in the middle of a street crossing, throwing from the platform a passenger who intended to alight as soon as the car should stop, is not sufficient to take the case to the jury, in the absence of evidence that the jerk was caused by defendant's negligence. Etson v. Railway Co. (Mich.) 68 N. W. 298.

[13] Metropolitan R. Co. v. Snashall, 3 App. D. C. 420. The fact that persons are not ordinarily thrown from their seats in rounding a curve does not justify the presumption, where a person was so injured, that the injury was chargeable to the want of care of defendant. Wilder v. Railway Co., 10 App. Div. 364, 41 N. Y. Supp. 931.

as to throw a passenger off his feet, and between the boat and the landing place, it is for the jury to say whether the carrier was negligent.[14]

§ 487. SAME — INJURIES TO PASSENGERS WHILE EMBARKING AND ALIGHTING.

As we have seen, it is the duty of a railroad company to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them;[1] and if a passenger is injured while attempting to alight at such a station, by reason of the sudden and unannounced starting of the train, the burden is thrown on the company of showing that the injury was not the result of its own act or negligence.[2] So, where a passenger is guilty of no negligence in the manner of alighting, and is injured by the sudden starting of the train, the presumption is that the failure to give her an opportunity to get from the car before the train started is attributable to the negligence of defendant's employés.[3] So, the sudden starting of the

[14] Gannon v. Ferry Co., 29 Hun (N. Y.) 631.

§ 487. [1] See ante, § 66.

[2] Raub v. Railway Co., 103 Cal. 473, 37 Pac. 374.

[3] Ferry v. Railway Co., 118 N. Y. 497, 23 N. E. 822, affirming 54 N. Y. Super. Ct. 325. Evidence that, on the stoppage of a street car, plaintiff at once walked out on the platform to get off, and that, while in the act of alighting, the driver suddenly started the car with a jerk, which caused her to fall, whereby she was injured, establishes a prima facie case of negligence in the management of the car. Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 8 South. 142. Where a passenger is injured in alighting from a street car, and the manner of the accident shows that something was the matter with the car, proof of the accident, and the means and cause of it, is suffi-

horses of an omnibus while a passenger is descending therefrom, throwing her to the ground, is prima facie evidence of negligence.[4] But, in opposition to these cases, it has been held by the supreme court of Michigan that the starting of a street car while a passenger is alighting raises no presumption of negligence. The burden is on plaintiff to show carelessness on the part of the driver.[5]

The fact that a car gives a sudden jerk while passengers are boarding it, injuring one of them, is sufficient evidence of negligence to warrant the submission of the question to the jury.[6] But an injury to a person attempting to board a moving car does not raise a presumption of negligence, though there has been a sudden starting of the horses.[7]

cient to put the carrier on his proof. Hitchcock v. Railroad Co., 8 N. Y. St. Rep. 848.

[4] Roberts v. Johnson, 58 N. Y. 613.

[5] Gardner v. Railway Co., 99 Mich. 182, 58 N. W. 49. Where a passenger on an open street car has signaled to the conductor to stop at the usual stopping place, and then arises in his seat preparatory to getting off, the mere fact that he was thrown from the car by a sudden jolt does not establish negligence on the part of the company. Bradley v. Railway Co., 94 Mich. 35, 53 N. W. 915.

[6] Daley v. Railroad Co., 80 Hun, 174, 29 N. Y. Supp. 1011.

[7] Stager v. Railway Co., 119 Pa. St. 70, 12 Atl. 821. But in Missouri it has been held that where the speed of a freight train is slackened at a depot, a sudden jerk of the caboose as a passenger attempts to get on board raises a presumption that the jerk was produced by the person in charge of the engine, and establishes a prima facie case of negligence. Murphy v. Railroad Co., 43 Mo. App. 342. Where neither the driver nor conductor of a street car have any knowledge of the intention of a boy to board the front platform of a street car, which has stopped to permit a passenger to get off the rear platform, the starting of the car in its ordinary course, and an

The starting of a street car with a jerk so great as to throw a passenger, in the act of seating himself, against the car window, cutting his hand and arm, raises a presumption of negligence against the carrier.[8] But in Florida it has been held that the fact that a passenger was injured by the starting of a street car after he had gotten inside, but before he got seated, does not make a prima facie case of negligence against the company. There should be evidence that a reasonable time was not afforded for him to take his seat, or that the car was started in an unusual manner.[9]

But the sole fact that a person is injured while endeavoring to get on or off a train, a street car, or a boat does not raise a presumption of negligence against the carrier.[10] Thus, where a train has come to a stop, and a passenger, on stepping from the lowest car step to the ground, fractures her knee cap, or sprains her

injury resulting to the boy therefrom, are not sufficient to raise a presumption of negligence. Pitcher v. Railway, 154 Pa. St. 560, 26 Atl. 559.

8 Dougherty v. Railroad Co., 81 Mo. 325; s. c., 9 Mo. App. 478.

9 Jacksonville St. Ry. Co. v. Chappell, 21 Fla. 175.

10 Olfermann v. Railroad Co., 125 Mo. 408, 28 S. W. 742; Rothchild v. Railroad, 163 Pa. St. 49, 29 Atl. 702. Proof of the fact that a passenger fell in leaving the car, and was injured by the wheel running over his leg, does not show the want of something which the defendant was bound to supply, or the presence of something which defendant was bound to keep away. "From this proof we have no right to presume that the train had not stopped a reasonable length of time at the station, nor that the agents of the company had failed to give all the signals, and discharge all the duties, imposed on them, nor that sufficient platforms were not provided for the ingress or egress of passengers." East Tennessee, V. & G. R. Co. v. Mitchell, 11 Heisk. (Tenn.) 405.

knee, without any apparent cause, and without any slipping or stumbling, or any external injury by a blow or force of any kind, no presumption of negligence arises against the carrier.[11] Nor does a presumption of negligence arise from the mere fact that a passenger about to alight is run into and injured by other passengers embarking on the train.[12] So, a passenger who falls in getting off a street car, while it is slowing down for the purpose of stopping, cannot recover, since defendant is not negligent.[13]

On the question whether a presumption of negligence arises from the fact that a small object, like a railroad spike or the bung of a beer barrel, lies loose on the station platform, injuring a passenger who steps on it on alighting from the train, opposite conclusions have been reached. The supreme court of Pennsylvania has held, and it would seem rightly, that no presumption of negligence arises in such a case. "As the cause of the accident was disconnected with the appliances or means of transportation, or the misconduct of employés, this presumption necessarily has no foundation. Assuredly, it cannot be maintained that a small piece of wood,—a bung of a barrel,—probably accidentally dropped upon the floor of the station, was such an obstruction as would be likely to produce injury. * * * Under such circumstances, with the platform perfectly constructed, care of it almost mi-

[11] Delaware, L. & W. R. Co. v. Napheys, 90 Pa. St. 135; Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130.

[12] Buck v. Railway Co., 15 Daly, 550, 10 N. Y. Supp. 107, affirmed 134 N. Y. 589, 31 N. E. 628.

[13] Defoe v. Railway Co. (Minn.) 68 N. W. 35.

croscopic in character is not required." [14] But one of the Texas courts of civil appeals has held that a jury is warranted in finding a railroad company negligent in permitting a railway spike, about four inches long, and nearly an inch thick, to lie loose on the station platform.[15]

The fact that the foot of a four year old child was caught, while she was leaving defendant's ferryboat, between the ferry bridge and the deck of the boat, does not prove that defendant was negligent, where it appears that the space between the deck and the bridge was from one to two inches, that defendant used the best appliances known, and that it was impossible, under certain conditions, to bring the boat and the bridge together so as to leave no space between.[16]

But it is the duty of a steamboat company to provide means by which a passenger can safely go from the boat to the wharf; and the fact that the stage plank used for that purpose fell while a passenger, in the exercise of due care, was walking over it, is prima facie evidence of negligence on the part of defendant in the performance of that duty.[17]

[14] Bernhardt v. Railroad, 159 Pa. St. 360, 28 Atl. 140.

[15] Ft. Worth & D. C. Ry. Co. v. Davis, 4 Tex. Civ. App. 351, 23 S. W. 737.

[16] Duke v. Ferry Co., 9 Misc. Rep. 268, 29 N. Y. Supp. 739, affirmed 145 N. Y. 640, 41 N. E. 88.

[17] Eagle Packet Co. v. Defries, 94 Ill. 598.

§ 488. SAME — FALLING OBJECTS AND MISSILES.

Cases involving injuries to passengers by falling objects or missiles clearly illustrate the proposition that no presumption of negligence arises against the carrier unless there is some defect in the means of transportation or an error of the carrier or his servants in their operation. Thus, where a passenger seated near an open window is struck by a missile on the arm with sufficient force to break it, no presumption of negligence arises, in the absence of any evidence to show what the missile was.[1] So, where a rock bounds down a steep hill, outside the right of way, crashes through a passing train, and kills a passenger within, no presumption of negligence arises against the carrier.[2] But where a passenger sitting at an open window is struck in the eye by a piece of coal, while the locomotive of another train on an adjacent track is directly opposite his window, it is for the jury to say whether the injury was caused by something connected with the operation of the road or from something entirely disconnected therewith; but it is error, on these facts, to instruct the jury that the happening of the accident raised a presumption of negligence against the carrier, and that the jury should begin their inquiries with the fact established that the injuries were the result of defendant's negligence.[3]

The mere falling of an open window in a railway car-

§ 488. [1] Thomas v. Railroad Co., 148 Pa. St. 180, 23 Atl. 989.

[2] Fleming v. Railway, 158 Pa. St. 130, 27 Atl. 858.

[3] Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14.

riage into the receptacle it occupies when closed is not evidence of negligence which will support an action against the railway company for a personal injury to a passenger whose hand rested on the ledge of the window. The window may have fallen either because of a defective construction or from having been put up by a passenger and insufficiently fastened, and it is for plaintiff to show the defective construction.[4] So, no presumption of negligence arises against a railroad company from the fact that a passenger, while looking at a time table suspended on a wall under the portico at a railway station, was struck by a plank and a roll of zinc falling from the roof of the portico.[5]

But the fact that a ventilator window falls, and strikes a passenger, while the porter is opening it with a stick hooked at one end, raises a presumption of negligence against the carrier.[6] So, the fact that a passenger on a car is injured by the fall of a porcelain lamp shade affixed to the upper part of the car, is prima facie evidence that the shade was defective and unsafe, and, if not explained or controlled, is sufficient evidence to authorize the jury to find that defendant was negligent in regard to it.[7] Evidence that the upper

[4] Murray v. Railroad Co., 27 Law T. (N. S.) 762. A passenger whose finger has been injured by the falling of a car window cannot recover, unless he shows that the window was raised to its proper height to be held by the catch, and that the catch was defective. It is just as probable that the window was not raised to its proper height as that the catch was defective. Voorhees v. Railroad Co., 3 Misc. Rep. 18, 21 N. Y. Supp. 775.

[5] Welfare v. Railway Co., L. R. 4 Q. B. 693.

[6] Och v. Railway Co., 130 Mo. 27, 31 S. W. 962.

[7] White v. Railroad Co., 144 Mass. 404, 11 N. E. 552. But the fall

berth of a sleeping car fell on a passenger riding in his proper place in the car, without fault on his part, raises a presumption of negligence against the carrier; [8] and so does evidence that a passenger on a steamboat was injured by a servant dropping a bale of cotton which he was handling.[9] So, the fact that a panel of a stove in a railroad station falls from its place while an employé is raking the fire is sufficient evidence of negligence on the part of the company to go to the jury, in an action by a passenger injured thereby, and to sustain a verdict in his favor.[10]

§ 489. SAME—DEATH OF PASSENGER.

The mere facts that a passenger is found dead on a railroad track, and that he was last seen alive while passing through a car on his way to the rear of the train, do not establish negligence on the part of defendant, but they have a tendency to show contributory negligence.[1] But, where a train stops so short a

ing of a bust from a balcony, striking a member of an audience at a public entertainment, is not evidence of negligence against the proprietors of the hall, in the absence of evidence that no portion of the audience had access to the balcony, and that the fall was not caused by them. Kendall v. City of Boston, 118 Mass. 234.

[8] Railroad Co. v. Walrath, 38 Ohio St. 461.

[9] Memphis & O. R. P. Co. v. McCool, 83 Ind. 392.

[10] Wilson v. Railroad Co. (City Ct. Brook.) 9 N. Y. Supp. 277, affirmed 130 N. Y. 675, 29 N. E. 1034.

§ 489. [1] State v. Maine Cent. R. Co., 81 Me. 84, 16 Atl. 368. An intoxicated passenger was seen leaving the cars at his destination, and the next morning was found 100 yards beyond the station, about 4 feet from the rail, with his legs cut through at the knee joint, and otherwise injured, so that he died. There was contradictory evi-

time at a station that a passenger without bundles can scarcely get off before it starts, the fact that another passenger incumbered with bundles, alighting at that station, is found mortally wounded by the cars shortly after the train left, will warrant the jury in inferring that the accident was caused by the sudden starting of the train.[2] So, where a passenger crossing a track by and under the direction of the ticket agent, for the purpose of taking a train, is run over and killed by the engine and cars, without fault on his part, the presumption is that the death was caused by the negligence of the company.[3]

§ 490. SAME—OTHER CASES WHERE PRESUMPTION HAS OBTAINED.

A presumption of negligence obtains against a carrier, where it stops a train on a trestle at night after whistling for a station, and a passenger gets off and falls from the trestle;[1] also where the name of a station is announced, and a passenger, believing that the station has been reached, alights in the nighttime, when the train shortly afterwards stops, and is almost immediately struck by another of defendant's trains

dence as to whether the train had stopped long enough at the station to enable passengers to alight, but there was no evidence as to the cause of the injuries. Held, that there was not sufficient evidence of negligence to go to the jury. Giles v. Railway Co., 36 U. C. Q. B. 360.

[2] Flanagan v. Railroad Co., 58 Hun, 611, 8 N. Y. Supp. 744, affirmed 125 N. Y. 773, 27 N. E. 409.

[3] Baltimore & O. R. Co. v. State, 63 Md. 135.

§ 490. [1] Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 356.

going in an opposite direction on a parallel track;[2] and also where a slight pressure by a passenger against a door of a railway carriage while looking out of a window causes the door to fly open, and the passenger to fall out.[3] The fact that a street car operated by electricity is so charged with the fluid as to injure a passenger coming in contact with it makes a prima facie case against the company; and the burden is on it to show that the injuries were not caused either by the electricity or the careless use of that agent.[4] So, where the brake of an electric car is suddenly set free as passengers are entering the car, striking one of them on the cheek, a presumption of negligence arises.[5] The deviation of a vessel from its course, and its subsequent wreck while on such course,—an unusual and unlikely event in the direct course,—resulting in injury to a passenger, raise a presumption of negligence, and cast on defendant the burden of proving that the deviation was necessary.[6] Where a passenger, while standing on the deck of a steamer, is injured by a fall of bag-

[2] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2.

[3] Gee v. Railway Co., L. R. 8 Q. B. 161.

[4] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269. The driver jumped off a street car, and the conductor ran towards the rear of the car, saying that he was not going to be killed. Plaintiff, not knowing the cause of the danger, followed him out, and was knocked off the rear platform as he was alighting. Held, that such facts, unexplained, proved a clear breach of duty on the part of the defendant, affirmatively establishing negligence. Kreuzen v. Railroad Co. (City Ct. N. Y.) 13 N. Y. Supp. 588.

[5] Gilmore v. Railroad Co., 6 App. Div. 117, 39 N. Y. Supp. 417.

[6] Marskwald v. Navigation Co., 11 Hun (N. Y.) 462.

gage which has been piled up on the deck, the jury is warranted in drawing an inference of negligence.[7]

§ 491. SAME—OTHER CASES WHERE PRESUMPTION HAS NOT OBTAINED.

The fact that the upper half of a swinging door at a station is provided with glass, which breaks by the impact of the door against the passenger's hand, which he puts out to arrest its motion, does not show a faulty construction of the door, nor give rise to a presumption of negligence against the carrier.[1] Nor does such a presumption arise from the fact that a passenger at a station is bitten by a stray dog, which does not belong to any one connected with the railroad, and which had been kicked out of the station by the porter shortly before it bit plaintiff; [2] nor from the fact that a passenger stumbles over satchels in the aisle of a car along which he is walking looking for a seat;[3] nor from the fact that

[7] Horowitz v. Packet Co., 18 Misc. Rep. 24, 41 N. Y. Supp. 54, affirming 15 Misc. Rep. 466, 37 N. Y. Supp. 1146.

§ 491. [1] Hayman v. Railroad Co., 118 Pa. St. 508, 11 Atl. 815. The mere fact that the rubber covering on the stairs of defendant's elevated railroad station was out of repair, and caused a passenger descending it to fall, is not sufficient to charge defendant with negligence, in the absence of evidence that such condition existed before the accident. Millie v. Railway Co., 10 Misc. Rep. 734, 31 N. Y. Supp. 801, affirming 5 Misc. Rep. 301, 25 N. Y. Supp. 753. An instruction to find for plaintiff, "if he sustained an injury" while walking along a depot platform, without reference to the question whether the company was negligent, is erroneous. Texas & P. Ry. Co. v. Reich (Tex. Civ. App.) 38 S. W. 257.

[2] Smith v. Railway Co., L. R. 2 C. P. 4.

[3] Stimson v. Railway Co., 75 Wis. 381, 44 N. W. 748.

snow falling on the deck of a ferryboat is not removed while the storm is in progress, even if a passenger falls on the deck by reason of its slippery condition.[4] The presence of a gang plank of a steamboat lying flat on its surface on the deck of a vessel, though across the path to the staircase leading from the lower to the upper deck, is not of itself sufficient evidence of negligence to enable a passenger, who has stumbled over the plank, to recover from the steamboat owner damages for the injury sustained.[5] The fact that the drop of a slip projects above the deck of a ferryboat, and that a passenger is injured by reason thereof while driving from the boat, is not prima facie evidence of negligence on the carrier's part.[6]

§ 492. SAME—CONTRIBUTORY NEGLIGENCE.

No presumption of negligence arises against the carrier where the occasion of the hurt of the passenger was an active voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation; and the reason is that in such cases it is necessary to consider whether there may not have been contributory negligence on the part of the passenger.[1] Hence the fact that a passenger is injured while alighting from a moving train does not give rise to a presumption of negli-

[4] Fearn v. Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

[5] Seddon v. Bickley, 153 Pa. St. 271, 25 Atl. 1104.

[6] Le Barron v. Ferry Co., 11 Allen (Mass.) 312.

§ 492. [1] Pennsylvania Co. v. Marion, 104 Ind. 239, 242, 3 N. E. 874.

gence against the carrier.[2] Nor does the presumption arise from the fact of injury while the passenger permitted his arm [3] or his head [4] to protrude from the car; nor from the fact that the sliding door of a stock car fell on a drover while he attempted to open it to get to his cattle, where his own evidence shows that he did not go about opening the door in a proper manner.[5] Neither does the presumption of negligence obtain if the passenger was in a place where he had no right to be, and if it does not appear that his being in such place did not affect the result. Hence, where a drover rides in the cupola on the top of the caboose, instead of in the caboose, the fact that he is thrown from his position by a concussion of a switch engine with the caboose does not establish a prima facie case of negligence against the company.[6]

§ 493. SAME—PERSONS NOT PASSENGERS.

In order that the presumption of negligence may obtain, it seems that the injured person must be a passenger. Certainly, the happening of an injury to a trespasser on a train,[1] or one thereon without right,[2] will not throw on the company the burden of proving that it was not negligent. Neither will negligence be presumed from the fact of an injury to a person escort-

[2] Id.

[3] Pittsburg & C. R. Co. v. Andrews, 39 Md. 329.

[4] Weaver v. Railroad Co., 3 App. D. C. 436.

[5] Kleimenhagen v. Railway Co., 65 Wis. 66, 26 N. W. 264.

[6] Tuley v. Railroad Co., 41 Mo. App. 432.

§ 493. [1] Sommers v. Railroad Co., 7 Lea (Tenn.) 201.

[2] Way v. Railway Co., 73 Iowa, 463, 35 N. W. 525.

ing a passenger on a train,[3] or to a gratuitous passenger,[4] though the last is doubtful on principle. It has been held, however, that the derailment of a train, producing injury to one neither a servant nor a passenger, but rightfully on the train at the invitation of the company's superintendent, raises a presumption of negligence.[5]

§ 494. SAME—REBUTTING THE PRESUMPTION.

Though an accident be of such a nature as to raise a presumption of negligence against the carrier, yet that presumption is not conclusive, but is subject to be rebutted by it.[1] But there is some conflict of authority on the question as to the burden of proof. It has been held recently that, in such a case, the burden of proof shifts to defendant, and that it must show by a preponderance of the evidence that it was not guilty of negligence, and that this in no sense can be said to be done where the evidence is in such equipoise on the point as not to impress the minds of the jury one way or

[3] Yarnell v. Railway Co., 113 Mo. 570, 21 S. W. 1.

[4] Hospes v. Railway Co., 29 Fed. 763. In view of the fact that the carrier owes the same duty to a gratuitous passenger as to a paying passenger, it would seem that there is no room for any distinction in this respect.

[5] Albion Lumber Co. v. De Nobra, 19 C. C. A. 168, 72 Fed. 739.

§ 494. [1] Meier v. Railroad Co., 64 Pa. St. 225; Wright v. Railroad Co., 3 Pittsb. R. (Pa.) 116, Fed. Cas. No. 18,089; Bird v. Railway Co. (1858) 28 Law J. Exch. 3. The presumption of negligence arising from the derailment of a car may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the utmost skill, foresight, and diligence. Eureka Springs Ry. v. Timmons, 51 Ark. 459, 11 S. W. 690.

the other.[2] Other cases, with apparently better reason, hold that the burden of proof rests on plaintiff throughout the trial, and that the presumption of negligence does not devolve on defendant the duty of showing, by evidence of a preponderating weight, that the accident was not the result of its negligence. It is entitled to a verdict if the evidence upon the issue is balanced; that is, if it preponderates on neither side.[3]

There also seems to be some divergence of opinion as to the functions of the court and jury in determining whether or not the presumption of negligence has been overcome by defendant's evidence. One set of authorities holds that, though defendant's evidence in explanation of the accident is uncontradicted, and shows defendant to be without fault, yet, since the jury are the sole judges of the credibility and the weight of the evidence, it is their province, and not that of the court, to determine whether or not plaintiff's prima facie case, arising from the happening of the injury, has been rebutted.[4] Thus, a verdict in favor of a passen-

[2] Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363.

[3] Mexican Cent. Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277. A cable car was run so close behind a wagon on the track as to touch or push it, so that when the wagon was turned into a side street by the driver it was upset. Held, in an action for injuries to a passenger caused thereby, that it was error to instruct that injury to a passenger, without fault on his part, raises a legal presumption of negligence. The question is for the jury whether, under all the circumstances, there was negligence in so running the car at the rate of speed at which it traveled, or in not stopping it when the wagon slackened its speed pace in turning out Hawkins v. Railway Co., 3 Wash. St. 592, 28 Pac. 1021.

[4] Hipsley v. Railroad Co., 88 Mo. 348. Where a passenger is injured by the train plunging into a gulf 40 feet deep, where the em-

ger injured by the explosion of the boiler of a locomotive hauling his train will not be set aside, though the uncontradicted evidence of defendant's employés shows that the boiler had been recently overhauled and repaired, and that the explosion resulted from a latent defect.[5] So, where a guy rope of a derrick stretching across a street is suspended too low for a street car to pass underneath in safety, and the driver of a car drives against the rope, which is in full view, causing the derrick to fall and kill a passenger, the jury is warranted in finding negligence, though all the witnesses may testify that there was none.[6]

bankment has been swept away, it is a question for the jury to decide, upon the whole evidence, whether defendant has succeeded in removing the presumption of negligence arising from the circumstances of the case, and establishing clearly that the accident arose, either from causes inexplicable, and involving no responsibility on its part, or from the hidden forces of nature, and the interposition of a supreme power, which no care, skill, or precaution on its part could avert or control. Brehm v. Railway Co., 34 Barb. (N. Y.) 256.

[5] Robinson v. Railroad Co., 9 Fed. 877. The prima facie case made by showing that plaintiff, while a passenger, was injured by the breaking of the axle of a tender, is not, as matter of law, overcome by the evidence of the engineer of the train that he examined the axle shortly before the accident, when it appeared to be in good order. Thatcher v. Railway Co., 4 U. C. C. P. 543. The falling of a lamp in a passenger car, causing a fire, and injury to a passenger in the car, is prima facie evidence of negligence; and such prima facie evidence is not overcome, as matter of law, by evidence that the lamp was of the best kind, and securely fixed in its place, and that the oil was not of a character to explode or take fire by the lamp falling from a height, but the question is one of fact for the jury. Hay v. Railway Co., 37 U. C. Q. B. 456. Whether the presumption of negligence against the carrier, arising from the happening of an accident to a

[6] See note 6 on following page.

The true rule probably is that where defendant's evidence in explanation of the accident is uncontradicted, and fair-minded men of ordinary intelligence would unite in saying that it showed defendant to be in the exercise of due care, the question is for the court; but, if there is any room for difference of opinion among such men as to whether the inference of due care should be drawn, the question is for the jury. This is the view generally adopted by courts as to the province of court and jury in actions for negligence,[7] and it would seem to be clearly applicable here. At any rate, it is unquestionable that there are cases where the court is justified in holding, as matter of law, that the presumption of negligence has been rebutted by defendant's evidence. Thus, the presumption arising from the wrecking of a train is overcome when it is shown that the disaster was caused by the act of God in the shape of an unprecedented rainstorm and flood.[8] So,

car, producing injury to the passenger, has been successfully rebutted, is for the jury. O'Conner v. Traction Co. (Pa. Sup.) 36 Atl. 866.

[6] Hunt v. Railroad Co., 14 Mo. App. 160. The court said: "There may be ways of inflicting an injury which are so easily and naturally guarded against by a moderate degree of care or forethought that they seem to be inseparable from an exhibition of the opposite qualities; and so a rational inference of negligence may arise from the manner of the injury alone. When counsel insist that in this case all prima facie indications of negligence were met by overwhelming proofs to the contrary, and ask us to say that their clients left nothing undone which extreme care and prudence could suggest in the premises, we must answer that these propositions were exclusively for the jury."

[7] See ante, § 28.

[8] Norfolk & W. R. Co. v. Marshall's Adm'r, 90 Va. 836, 20 S. E. 823. The presumption of negligence arising from the falling of a bridge

the presumption arising from the fact that a railroad bridge was down, and that a passenger train plunged into the chasm, is rebutted by proof that the bridge was burned by the public enemy on a sudden inroad, and that the trainmen had no notice of the fact.[9] So, the presumption arising from the derailment of a street car is conclusively rebutted by evidence that there was a perfect track, car, and harness in good repair, gentle horses, and a skillful driver at his post; and that, while the car was proceeding upon the track, an express wagon was driven suddenly in front of the team and suddenly stopped, and a man with a bundle jumped suddenly in front of the horses and towards them, thereby startling them, and thereby causing them for the moment to become unmanageable, and to derail the car.[10]

The presumption of negligence, however, can only be overthrown by proof that the casualty "resulted from inevitable or unavoidable accident, against which no

while a passenger train is crossing it is rebutted by evidence that the bridge was properly constructed of sound material some eight years before the accident, that it was thoroughly inspected each month for several years before the accident without discovering any defect, and that the accident was solely caused by a sudden accession to the waters of the stream by an unprecedented rain, which washed the earth from beneath the sills supporting the bridge, letting the whole structure down to the level of the stream. Wabash, St. L. & P. R. Co. v. Koenigsam, 13 Ill. App. 505.

[9] Sawyer v. Railroad Co., 37 Mo. 241.

[10] Perry v. Malarin, 107 Cal. 363, 40 Pac. 489. Uncontradicted evidence that third persons criminally placed cars on the main track for the purpose of causing a collision with a passenger train, rebuts the presumption of negligence arising from the fact of the collision. Fredericks v. Railroad, 157 Pa. St. 103, 125, 27 Atl. 689.

human skill, prudence, or foresight, as usually applied to careful railroad management, could provide." [11] The inference of negligence raised by the giving way of an apparatus solely under a carrier's control, and resulting in injury to a passenger, is not dispelled by the mere fact that the defective condition was not observed or apparent, if there were means available, by careful examination or practicable tests, to discover the cause of the infirmity in the defective appliance.[12] So, the presumption of negligence arising from the derailment of a car, producing injury to a passenger, is not rebutted by evidence that the track had been inspected and found in good repair the day before the accident, where it does not appear that the person making such inspection was competent, or that any one had inspected the coaches.[13] Proof that a broken rail was sufficient in size and free from all defects is not sufficient, as matter of law, to rebut the presumption of negligence arising from the derailment of the car, but there should be evidence that the rail had been properly laid down, and spiked on sound and sufficient

[11] Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 3 N. E. 836. Where a railroad bridge breaks down while a passenger train is crossing, it is not sufficient to rebut the presumption of negligence for the carrier to show that it was using the means and appliances ordinarily employed by prudent persons in making repairs of the bridge, without also showing that they are ordinarily sufficient, and that they were without known or discoverable defect, and were used with the utmost practicable care and diligence. Louisville, N. A. & C. R. Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627.

[12] Miller v. Steamship Co., 118 N. Y. 199, 23 N. E. 462.

[13] St. Louis & S. F. Ry. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883.

cross-ties.[14] So, a prima facie case of negligence made out by proof of collision of a train with an animal on the track, causing injuries to a passenger, is not overcome, as matter of law, by evidence that the animal got on the track without the knowledge of the company's employés, where it is not shown that the company or its servants exercised due care to keep the animal off the track or to prevent the collision.[15] So, the presumption of negligence arising from the fact that a passenger leaving a steamboat was injured by the falling of a stage plank while walking over it is not conclusively rebutted by showing that the wind moved the end of the boat around, in the absence of evidence that the boat was fastened to the wharf, or that it could not have been so fastened as to prevent its being moved by

[14] Pittsburgh, C. & St. L. R. Co. v. Williams, 74 Ind. 462. The derailment of a street car while rounding a curve, together with evidence of inattention on the part of the driver, is sufficient to carry the case to the jury, though defendant's evidence shows that the track was in good condition, and was constructed in such a manner as to materially reduce the chances of derailment. Pollock v. Railroad Co., 60 Hun, 584, 15 N. Y. Supp. 189, affirmed 30 N. E. 1150. The fact that a stagecoach was overloaded, and that a wheel came off, makes out a prima facie case of negligence, and is not overcome, as matter of law, by evidence that the coach, and the mode of securing its wheels, were of approved construction and in good order. Smith v. Robertson, 8 Vict. Law Rep. 256. Injury to a passenger on an omnibus, caused by the shying of the horses, and running into a bank at the side of the road, makes out a prima facie case of negligence against the carrier, which is not overcome, as matter of law, by conflicting evidence that the shying was caused by a dog, which suddenly barked at the horses. Pink v. Omnibus Co., 6 Vict. Law Rep. 186.

[15] Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597.

the wind.[16] So, the presumption arising from an explosion on a steamboat and the death of a passenger is not rebutted, as matter of law, by proof that the explosion was not of the boiler or machinery of the boat, and by some evidence in support of the theory that dynamite was taken aboard the boat by some unknown person just before it left the wharf, but the question is for the jury.[17]

But, in rebutting the presumption of negligence arising from an accident, the carrier need prove merely that it had not been negligent in respect to those matters which the circumstances indicated were the cause of the injury, and it need not show that it was also careful as to other matters not connected with the accident.[18] Thus, to rebut the presumption of negligence arising from the uncoupling of a train, and a consequent injury to a passenger, it is not incumbent on the carrier to satisfactorily explain the accident, but it is sufficient that it exercised due care in the selection and operation of the coupler.[19] So, the presumption of negligence arising from the derailment of a car may be overcome by evidence that the track and cars were well built and in good condition, and that the train was properly managed; and, to take the case to

16 Eagle Packet Co. v. Defries, 94 Ill. 598. The presumption of negligence arising from an injury to a passenger in an omnibus by the explosion of a camphene lamp is not overcome, as matter of law, by proof that the lamp itself was in good order, without any showing as to whether camphene is a dangerous illuminant. Wilkie v. Bolster, 3 E. D. Smith (N. Y.) 327.

17 Spear v. Railroad Co., 119 Pa. St. 61, 12 Atl. 824.

18 Pershing v. Railway Co., 71 Iowa, 561, 32 N. W. 488.

19 Tuttle v. Railroad Co., 48 Iowa, 236.

the jury on the question of due diligence, it is not necessary for defendant to specifically disclose the real cause of the accident, and thus make it appear that it is exempt from responsibility.[20] So, though the breaking of a rail causing the derailment of a passenger car is prima facie evidence of negligence against the carrier, yet the jury is justified in finding in its favor where there is evidence that the train was managed by skillful and prudent operatives, that the track was constructed with skill and care, that it was patrolled at frequent intervals by an inspector, and that it had been carefully inspected just before the accident, and no defects were discoverable, and that the accident happened in extremely cold weather, when no engineering, however skillful, can prevent rails from breaking.[21]

§ 495. SAME—RULE IN TEXAS.

As we have seen, in Texas the province of the jury as to the question of negligence is wider than in most of the states.[1] It has accordingly been held that while proof of an injury to a passenger from the derailment of a train, unexplained and uncontradicted, is sufficient evidence for a jury to find against the carrier, it is still incorrect for the court to so declare or charge as a proposition of law. The question is for the jury, and not the court.[2] But, in a very recent case, the supreme

20 Eldridge v. Railway Co., 32 Minn. 253, 20 N. W. 151.

21 Heazle v. Railway Co., 76 Ill. 501.

§ 495. 1 See ante, § 28.

2 San Antonio & A. P. Ry. Co. v. Robinson, 73 Tex. 277, 11 S. W. 327; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; Texas

court of Texas said: "It is a reasonable and sound doctrine that when a passenger is injured by an accident, such as the derailment of a train, at a place where the track and train are entirely under the control of the company,—that is to say, where they are not interfered with by an extraneous force,—a presumption of negligence arises; and that, in order for the company to exonerate itself from liability for the injury, it must adduce evidence to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with a prosecution of its business." [3]

§ 496. SAME—STATUTORY PRESUMPTIONS.

The Mississippi Code [1] provides: "In all actions against railroad companies for damage done to person or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima

& P. Ry. Co. v. Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994. But see Gulf, C. & S. F. Ry. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104. In an action for injuries to a passenger in a railroad collision, the judge charged: "When it is shown by the proof that an injury was received by reason of such a direct result of an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further appears by the proof that such unusual occurrence was not the result of negligence, but, on the contrary, was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented." Held, a charge on the weight of evidence, prohibited by statute, for it informed the jury that the law presumed negligence from the happening of any unusual occurrence producing the injury. Texas Cent. Ry. Co. v. Burnett, 80 Tex. 536, 16 S. W. 320.

[3] Mexican Cent. Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277.

§ 496. [1] Ann. Code Miss. 1890, § 1808.

facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." In construing this statute the supreme court of Mississippi [2] has said: "It means that injury inflicted, unexplained, calls for exculpation; for it imputes blame in every case of injury inflicted by the running of locomotives or cars, until the facts shown relieve from the imputation. When the facts appear, no matter how, it is a question determinable from them whether or not there was reasonable care or skill. The statute was enacted to meet cases where the manner of the injury inflicted is not known to others than the employés of the railroad company, but it is equally applicable where a cloud of witnesses see the injury. It is not needed there, it is true, but it is not error to invoke it, for the law affects the railroad company with liability, prima facie, in every case of injury inflicted by the running of its locomotives or cars; but, if it does not, the presumption created by law from the fact of injury in this mode is to stand and control." But, since the presumption arises only where the injuries are caused by the "running of the locomotives or cars," the statute does not apply to the case of a passenger who falls from a car platform while the train is stationary.[3]

By statute in Georgia and Florida,[4] a presumption of negligence arises against a railroad company in all cases of injury or damage to person or property by the

[2] Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 South. 537.

[3] Chicago, St. L. & N. O. R. Co. v. Trotter, 60 Miss. 442.

[4] Code Ga. 1882, § 3033; Laws Fla. 1890-91, c. 4071, § 1. See, also, ante, § 474.

running of locomotives or cars, or caused by any person in the employment of such company, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence. Under this statute a presumption of negligence arises in all cases where a passenger is injured while being transported on a railroad.[5] On showing that he was injured by the running of defendant's cars, the legal presumption arises that plaintiff was injured by defendant's negligence; and it is not incumbent on plaintiff to prove the alleged negligence of defendant by a preponderance of the evidence.[6] But this presumption may be overcome by evidence showing that the company was not at fault,[7] and this may be accomplished by plaintiff's own evidence.[8] But a railroad company cannot exonerate itself from liability for injuries to a passenger by showing merely ordinary care and diligence, since another section of the Code [9] requires carriers to exercise extraordinary care and diligence to protect the lives and persons of their passengers. As to passengers, extraordinary diligence is the reasonable diligence required by law.[10] Mere proof that the company does not know how the accident occurred, and that it cannot find out, is not sufficient to

5 Central R. R. v. Freeman, 75 Ga. 331; Southwestern R. R. v. Singleton, 67 Ga. 306.

6 Killian v. Railroad Co. (Ga.) 25 S. E. 384.

7 Atlanta & F. R. Co. v. Fuller, 92 Ga. 482, 17 S. E. 643.

8 Western & A. R. R. v. Abbott, 74 Ga. 851.

9 Section 2067.

10 East Tennessee, V. & G. Ry. Co. v. Miller, 95 Ga. 738, 22 S. E. 660.

exonerate it.[11] But the statutory presumption is overcome where the undisputed physical facts indicated that deceased attempted to board one of the cars as the train was passing him.[12] So, the fact that a passenger is thrown to the floor by the starting of the train without any unusual jerk, while she is standing on her seat to reach her bundles placed in the receptacle above her, does not render the company liable, in the absence of any knowledge by its employés of the dangerous position in which she had placed herself.[13]

[11] Central R. R. v. Sanders, 73 Ga. 513.

[12] Georgia, S. & F. R. Co. v. George, 92 Ga. 760, 19 S. E. 813. The presumption is rebutted where it appears that a passenger's fingers slipped into the crevice of an open door near the hinges, and were injured by the sudden closing of the door by one of the train hands, who did not know the fingers were in until they were crushed. Murphy v. Railroad Co., 89 Ga. 832, 15 S. E. 774.

[13] East Tennessee, V. & G. Ry. Co. v. Green, 95 Ga. 737, 22 S. E. 658. As long ago as 1838, congress by a statute, which appears to be obsolete at the present time, provided that in cases of injuries to person or property "from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full prima facie evidence sufficient to charge defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment." Act Cong. July 7, 1838 (5 Stat. 306, § 13). Under this statute it has been held that, in an action by a passenger for injuries sustained by the explosion of a boiler flue, the burden is on the steamboat proprietors to show that there was no negligence. The New World v. King, 16 How. 469.

§ 497. CREDIBILITY OF WITNESSES.

Various rules touching the credibility of witnesses have been laid down by the courts for the purpose of enabling juries to determine with which party the preponderance of the evidence lies. It is, of course, outside of the scope of this work to go into these rules in detail, but it may not be amiss to state some of them, with illustrations arising in actions by passengers.

It may be stated as a general rule that the interest or bias of a witness may always be shown. But the extent to which, for the purpose of showing such bias or interest, the court will permit examination as to collateral matters, is entirely within the discretion of the court, and, unless such discretion is abused, it will not be interfered with upon appeal.[1] On this principle, in an action against a railroad company, a witness for defendant may be cross-examined as to his relations with its president.[2] So, in determining the weight and credit to be given to the testimony of a party to the suit, the jury have a right to consider his interest.[3] But it is error to instruct the jury that they are bound to subject the testimony of the employés of a defendant railway company to the same severe criticism as they are the evidence of the plaintiff; but it is for them to

§ 497. [1] Lustig v. Railroad Co., 65 Hun, 547, 20 N. Y. Supp. 477.

[2] Hoffman v. Railroad Co., 87 N. Y. 25.

[3] New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242. It is therefore error for the court to charge the jury that they cannot disregard the testimony of a party, unless his manner and conduct in giving his testimony, and the testimony of other witnesses in the cause, satisfy them that what he said is false. Id.

determine, in considering all the probabilities of the case, how much credit these witnesses are entitled to receive.[4]

Another method of impeaching the credibility of a witness is by showing that his general reputation for truth and veracity is bad in the community in which he lives.[5] But, before a witness can be impeached on this ground, it must be shown that the bad reputation is general in the community where he lives, though the opinion of the community need not be unanimous.[6] Where evidence is first put in showing bad character of a witness at his place of residence at the time of testifying, there is no error in then permitting the assailing party to show the bad reputation of the witness for a reasonable time, say two or three years before, at a former place of residence.[7]

At common law, a person convicted of an infamous crime was forever afterwards incompetent to testify as a witness in courts of justice, unless the disability was removed by a pardon or a special statute. In most of the American states, this disability has been removed by statutes which permit the fact of such a conviction to be put in evidence for the purpose of affecting the credibility of the witness. Even in the absence of such a statute, proof of the conviction is relevant to impeach the credibility of the witness.[8] But in a civil action it is improper to admit parol evi-

[4] Uransky v. Railroad Co., 59 Hun, 626, 13 N. Y. Supp. 670.

[5] 1 Greenl. Ev. § 461.

[6] Winter v. Railway Co., 80 Iowa, 443, 45 N. W. 737.

[7] Memphis & O. R. Packet Co. v. McCool, 83 Ind. 392.

[8] Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75.

dence that plaintiff had been charged with or tried for a criminal offense. There must be proof of conviction, and the conviction must be proved by the record.[9]

Evidence that a witness was intoxicated at the time of the occurrence to which he testifies is admissible to discredit his testimony.[10] But, in an action against a railroad company for personal injuries, defendant cannot impeach plaintiff's credibility as a witness by evidence that he has made similar claims against other corporations, not shown to be fraudulent, nor connected with the claim in suit.[11]

§ 498. SAME—CONTRADICTORY STATEMENTS.

It is competent to show that a witness has made statements on former occasions which differ on material points from his testimony given at the trial. Thus, where the track foreman has testified that the track was in good order at the place of the accident, it is competent to contradict him by proving his declarations that the road was not in good order.[1] Not only may verbal declarations be put in evidence for this purpose, but a written report made by a railroad employé, as to

[9] Killian v. Railroad Co. (Ga.) 25 S. E. 384. Evidence that an important witness in a personal injury suit was arrested on a charge of burglary is inadmissible, where it appears that he was discharged without trial. Denver Tramway Co. v. Reid (Colo. Sup.) 45 Pac. 378.

[10] Mace v. Reed, 89 Wis. 440, 62 N. W. 186.

[11] Hansee v. Railroad Co., 66 Hun, 384, 21 N. Y. Supp. 230. That a party pays a witness a moderate sum in excess of his legal fees for attending a trial does not impeach the credibility of the witness. Chicago W. D. Ry. Co. v. Conley, 43 Ill. App. 347.

§ 498. [1] Sloan v. Railroad Co., 45 N. Y. 125; Dampman v. Railroad Co., 166 Pa. 520, 31 Atl. 244.

the happening of the accident, and in possession of the railroad company's attorneys, may be used by plaintiff's attorney to impeach the testimony of the employé given at the trial.[2] So, statements in a deposition, signed by the witness, may be given in evidence to contradict his testimony at the trial, though he denies the correctness of the deposition, and though it is not offered in evidence as a deposition.[3]

A witness may be interrogated on cross-examination as to statements made by him showing his hostility to the party against whom he is called; and, if he deny having made them, the statements may be proved by other witnesses.[4] A witness may therefore be asked on cross-examination whether he had in another action endeavored to procure a witness to testify falsely in order to fasten a liability on defendant; and, if he denies such fact, it may be proved by other witnesses.[5]

[2] Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730.

[3] Southern Kansas Ry. Co. v. Painter, 53 Kan. 414, 36 Pac. 731. Where a witness is asked on cross-examination if he had a certain conversation with a person named, and denies it, the deposition of the named person is admissible to impeach the witness, notwithstanding it was taken under a commission at the execution of which the witness sought to be impeached was not examined. Pittsburg & C. R. Co. v. Andrews, 39 Md. 329.

[4] Texas & P. Ry. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034, citing Newton v. Harris, 6 N. Y. 345; Atwood v. Welton, 7 Conn. 66; Drew v. Wood, 6 Fost. (N. H.) 363; Martin v. Farnham, 5 Fost. (N. H.) 195; Long v. Lamkin, 9 Cush. (Mass.) 361.

[5] Schultz v. Railroad Co., 89 N. Y. 242, reversing 46 N. Y. Super. Ct. 211. But in an action for the death of a passenger, one of defendant's witnesses cannot be impeached by showing that he had said that money would be no object to the company if a witness could be found that would testify that deceased had done certain things after the accident, where he has not testified that deceased did any of these

But before such contradictory statements can be given in evidence a foundation must first be laid by making a preliminary inquiry of the principal witness whether he has made such statement. The rule is thus stated by Mr. Justice Stephen: [6] "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and, if he does not distinctly admit that he has made such a statement, proof may be given that he in fact made it." To lay the foundation for impeachment, it is necessary to ask the witness specifically whether he has made such statements; and the older and most accurate mode of examining the contradicting witness is to ask the precise question put to the principal witness. Otherwise, hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties and in violation of legal rules. But the practice on this subject must be, to some extent, under the control and discretion of the court. It is important that

things. Such evidence is clearly incompetent, and highly prejudicial, because it convicts defendant of a willingness, at least, if not of the fact, of resorting to foul means to procure evidence, and to throw a cloud on the integrity of the evidence that defendant did introduce as to the doing of these things by deceased. Louisville & N. R. Co. v. Ritter's Adm'r, 85 Ky. 368, 3 S. W. 591. The impeaching testimony simply goes to the credibility of the witnesses, and is incompetent as substantive evidence tending to show the fact stated therein. Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75.

[6] Steph. Dig. Ev. art. 131.

the jury should understand that such evidence is collateral, and not evidence in chief; and the witness sought thus to be impeached should have an opportunity of making explanation, in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misapprehension; and, for the purpose of eliciting the real truth, the court may vary the strict course of examination.[7] As a general rule, however, it is not now required that the impeaching evidence shall be in the same language and in answer to the same questions asked of the witness to be impeached.[8] So, where a witness denies that he made a

[7] Sloan v. Railroad Co., 45 N. Y. 125. Where, on cross-examination, a witness is interrogated as to a conversation, with a view to laying a foundation for impeaching him, he has a right to give the whole conversation, as far as it is pertinent; and this without reference to whether the other person to the conversation was an agent of the cross-examining party or not. Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200.

[8] Spohn v. Railway Co., 122 Mo. 1, 26 S. W. 663. In this case plaintiff testified that he was frightened into jumping from a running train by threats of the conductor and others to tie and rob him, and throw him from the train. The conductor testified that plaintiff did not jump, and that neither he nor any one else on the train, to his knowledge, made any threats to frighten plaintiff. The conductor was then asked, on cross-examination, "if he did not, at or about the last trial in Jefferson City, in or about December, 1881," tell M., of that city, that "you men told stories to plaintiff, and that you scared him, and that you didn't think he was going to jump off, or words to that effect." The conductor denied making such statement. Held, that sufficient foundation was laid for impeaching testimony by M. "Surely this question sufficiently advised him of the declarations on which he was to be impeached, when made, to whom made, and the occasion on which they were made, which, in itself, suggested the place where made." Id., overruling Spohn v. Railway Co., 116 Mo. 617, 22 S. W. 690.

certain statement to one "E. B. S." at a certain time and place, a sufficient foundation is laid to enable plaintiff to call one "Edward S." to testify as to the making of such statement.[9]

It has, however, been held not to be necessary to lay any foundation in order to give in evidence the declarations of a party to the suit, for the purpose of impeaching his testimony.[10]

It should also be borne in mind that the contradiction must be as to some material issue in the case. If a party, on cross-examination, draws out immaterial matter, it is not competent for him to contradict the statements of the witness so drawn out, by way of impeachment.[11] As to immaterial issues, the answer of a witness on cross-examination is conclusive, and he cannot be contradicted.[12]

§ 499. SAME—FALSUS IN UNO, FALSUS IN OMNIBUS.

Belief that a witness has willfully testified falsely as to any material fact in the case authorizes the jury to reject all his testimony, unless corroborated by other credible evidence.[1] But, in order to authorize the jury

[9] Hinton v. Railroad Co., 65 Wis. 323, 27 N. W. 147.

[10] Owens v. Railroad Co., 95 Mo. 169, 8 S. W. 350.

[11] Lake Erie & W. R. Co. v. Morain, 140 Ill. 117, 29 N. E. 869.

[12] Morris v. Railroad Co., 116 N. Y. 552, 22 N. E. 1097. A brakeman cannot be cross-examined as to declarations that he was to blame for an accident, where they do not legitimately tend to impeach or contradict his evidence in chief, and where they are not a part of the res gestæ; and having denied, on such cross-examination, making the declarations, they cannot be proved by other persons. Sherman v. Railroad Co., 106 N. Y. 542, 13 N. E. 616.

§ 499. [1] Brown v. Railroad Co., 51 Iowa, 235, 1 N. W. 487. In

to reject the entire testimony of a witness on the ground that he has knowingly testified falsely in the case, such false testimony must have been in relation to a material fact.[2] So, the testimony must have been willfully and knowingly false. The mere fact that a witness has been successfully impeached or contradicted in a material matter sworn to by him does not authorize the jury to disregard his whole testimony. The rule, "Falsus in uno, falsus in omnibus," has relation to willful falsehood, and should be so restricted in giving it in charge to the jury.[3] But it is sufficient that a witness has testified either willfully "or" knowingly falsely to any material matter, to authorize the jury to disregard his entire evidence.[4]

The jury is, however, under no compulsion to disregard the evidence of a witness who has knowingly testified falsely in regard to any material fact, but they may do so if they see fit.[5] Hence it is proper to refuse a charge that they should do so.[6]

Missouri it has been held that the jury is at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncontradicted. Brown v. Railroad Co., 66 Mo. 588. But this would seem to be carrying the rule to a dangerous extent.

[2] Schmitt v. Railway Co., 89 Wis. 195, 61 N. W. 834.

[3] Central Railroad & Banking Co. v. Phinazee, 93 Ga. 488, 21 S. E. 66.

[4] Owens v. Railroad Co., 95 Mo. 169, 8 S. W. 350.

[5] Cole v. Railway Co., 95 Mich. 77, 54 N. W. 638.

[6] Demond v. Railroad Co., 8 Misc. Rep. 610, 29 N. Y. Supp. 318.

§ 500. POSITIVE AND NEGATIVE TESTIMONY.

As a general rule, a witness who testifies positively to an affirmative is entitled to greater credit than one who testifies to a negative, because he who testifies to a negative may have forgotten, or may not have been in as good a position to see and hear what was going on. The evidence of a witness that a given thing occurred is positive testimony. The evidence of another witness that he was present on the occasion referred to, and did not see or hear the occurrence in question, is negative testimony; nor is such testimony rendered positive by a mere statement of the witness that such an occurrence could not have taken place without his seeing or hearing it. To entitle his evidence, other things being equal, to as great weight as that of the former witness, it must appear that his opportunities for seeing or knowing what occurred were at least equal to those of that witness, and that his attention was specially directed to the matter in question.[1] Hence the mere fact that a passenger does not hear the name of his station called is not sufficient to establish the failure to announce it, where the porter, whose duty it was to do this, testifies positively that he did so, and it appears that plaintiff is a morphine eater, subject to fits of unconsciousness.[2] But in an action for running over a passenger at a station it was held, in the house of lords, that testimony by ten of defendant's employés that the whistle was sounded did not

§ 500. [1] Killian v. Railroad Co. (Ga.) 25 S. E. 384.

[2] Tillery v. Bond, 38 Fed. 825.

authorize the direction of a verdict in its favor, where three friends of the deceased testified merely that they did not hear it, but that the question was for the jury to decide.[3]

§ 501. FAILURE TO CALL WITNESS.

Where a party, not called as a witness in his own behalf, possesses knowledge of the facts in controversy unknown to others who have been called as witnesses, and such facts would supply positive evidence of what would otherwise be established by inference from other facts proven, then there is a presumption that the facts in the knowledge of the party not produced would be, if produced, harmful to the party relying upon such inference. Such presumption may be rebutted by any satisfactory explanation why such party is not produced or his deposition taken. But the mere omission of a party to call a witness, other than the party himself, who might with equal propriety have been called by the other party, is no ground for a presumption that the testimony of the witness would have been unfavor-

[3] Dublin, W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155. In an action for injuries to a passenger while alighting from a street car, plaintiff testified that she rang the bell as a signal for the car to stop, while the driver and six passengers testified that he or she did not hear the bell ring, some of them being very positive that she did not ring it. Held, that it was not reversible error for the court to charge: "The rule of law is that the testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred." Hinton v. Railroad Co., 65 Wis. 323, 27 N. W. 147.

able.[1] But the failure of a party to call as a witness in his behalf his wife, who had knowledge of the facts, leaves the jury at liberty to infer that her testimony would have been unfavorable to him.[2] But, while counsel cannot call on the court for an instruction that the unexplained absence of a material witness for the opposing party raises a presumption against such party, he has a right to make proper comment to the jury on the subject.[3]

§ 501. [1] Cole v. Railway Co., 81 Mich. 156, 45 N. W. 983. In this case, a female passenger, accompanied by a gentleman, alleged that both fell into a hole in a culvert as they were leaving the company's premises in the nighttime. Plaintiff's case was managed by her companion, whose testimony established the fall. It was claimed that this fall produced a female trouble, and a physician whom she had consulted a week after the alleged accident testified that her then condition might have been caused by a fall. On the other hand, defendant's testimony showed that she had complained of female troubles before the accident, and defendant's experts testified that her ailments were as attributable to other causes as to a fall or a blow. Held, that the failure to produce plaintiff as a witness at the trial, or to take her deposition, coupled with her refusal to submit to any examination by defendant's experts, raised a presumption that her ailment was not caused by a fall.

[2] Carpenter v. Railroad Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

[3] Cross v. Railway Co., 69 Mich. 363, 37 N. W. 361. One of plaintiff's witnesses testified that he, in company with a section foreman in defendant's employ, examined the track the evening before an accident, and discovered certain defects. Defendant attempted to contradict this evidence by the testimony of another witness who saw the track after the accident. Held, that it was proper for plaintiff to show that the section foreman was still in defendant's employ, and could easily have been called as a witness by it, and to argue therefrom that the testimony of plaintiff's witness as to the condition of the track was true. Beattie v. Railway Co., 41 Vt. 275.

§ 502. WEIGHING EXPERT EVIDENCE.

The duty of the jury in weighing expert evidence has been carefully stated by the supreme court of Alabama in a recent case: "If the jury reach a given conclusion from a consideration of the whole evidence, including as well the opinions of the experts as substantive facts deposed to by witnesses, whether experts or nonexperts, they are not to surrender their conclusion, which is their opinion on the whole evidence, because the opinions of the experts do not coincide with theirs, but lead to a different result; or, to express the same thought in variant phraseology, the jury are not to substitute for their own views of what is established by the whole evidence—substantive and opinion, expert and nonexpert—the opinion of expert witnesses; for, to thus surrender their own conclusions, and substitute instead the conclusions of witnesses as to what was proved by the evidence, would be to make such witnesses, and not the jury at all, the triors of the cause." [1] A very similar conclusion was reached by the supreme judicial court of Massachusetts in a case where the uncontradicted evidence of defendant's experts was that a "flying switch" was a safe and proper way of connecting cars. "Railroads have been so long in use, are so common, and commonly used by the public, and the different methods adopted of managing trains and connecting cars and trains are so far matter of common knowledge, observation, and experience, that, when all the facts were before them, the jury

§ 502. [1] Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722.

were competent to judge, without the aid of expert testimony, whether the method adopted in this case to accomplish the purpose intended was safe and prudent, compared with other methods which might have been adopted to accomplish the same purpose. It was for the jury to determine how far the opinions of experts, which were in the case without objection, should influence their judgments, and how far the experts were liable to be biased by the fact that they had adopted or sanctioned the method in question, especially when they admit that a great difference of opinion exists among railroad experts as to the safety of the method adopted in this case, compared with other methods." [2] Scientific opinions, it has been held, are worthless when pitted against facts. "The theories of medical men are not always reasonable, and are never to be regarded when they manifestly conflict with established facts." [3]

[2] White v. Railroad Co., 136 Mass. 321. Although great respect should be paid to the opinions of scientific witnesses respecting the cause of the giving way of an embankment, yet they are no more controlling than are those of any other class or body of men, when speaking upon subjects which lie within the range of common experience and observation. Brehm v. Railway Co., 34 Barb. (N. Y.) 256. Where plaintiff proves that an accident happened by the giving away of an embankment, the jury is entitled to rely on the opinion of witnesses as to the causes which produced this state of circumstances. Great Western Ry. v. Braid, 1 Moore, P. C. (N. S.) 101, 116.

[3] Stone v. Railway Co., 66 Mich. 76, 33 N. W. 24. In an action for injuries resulting in a miscarriage, where plaintiff testifies that she felt the motion of the child on the day of the accident, the jury has a right to disregard the opinion of medical experts that the child must have been dead before that time, based on conflicting evidence as to its appearance after delivery. Id. A foot path, four feet three in hes

§ 503. CONFLICT OF EVIDENCE—PROVINCE OF JURY.

It is a familiar rule of law that, when the evidence is conflicting, the weight of it, including the credibility of witnesses, is to be determined by the jury. When plaintiff's own testimony shows that he was free from contributory negligence, the court is not justified in directing a verdict against him, though five witnesses for defendant, four of whom are in its employ, show him to be guilty thereof.[1]

wide, on a pier used by a railway as a platform, was protected by a railing on the side next to the water, and by a wooden guard nine inches high on the side next to the railroad. A passenger, waiting for a steamer, started to run along the footway arm in arm with a friend, caught his foot in the interstices between the planks of which the footway was made, fell over on the railway track, and was killed by an approaching train. Held, that mere opinion evidence by two witnesses that the footway was dangerous was not sufficient evidence of negligence to take the case to the jury. Rigg v. Railway Co., 12 Jur. (N. S.) 525.

§ 503. [1] Keokuk N. L. Packet Co. v. True, 88 Ill. 608. Where plaintiff's evidence is that she started from her seat, with her baby in her arms, and proceeded with reasonable diligence to the front platform, and was injured, while alighting, by the starting of the train, it is error to direct a verdict in defendant's favor, though its evidence is that she did not start to leave the train until it was in motion, and that she jumped from it while it was moving. Alford v. Railway Co., 86 Wis. 235, 56 N. W. 743. Evidence by plaintiff that after the car had slackened speed, and while he was waiting on the car steps to get off, it made a sudden start forward, and threw him off, will uphold a verdict in his favor, though defendant's witnesses all testify that he got off the car while in motion. Ganley v. Railroad Co., 55 Hun, 605, 7 N. Y. Supp. 854. Plaintiff testified that, as she was about to ascend the steps of the car, the brakeman sprang upon the steps in front of her, and the start he gave her caused her

Sometimes, however, there is a conflict not only between witnesses, but also with physical facts or the laws of nature. In an action for injuries to a passenger on an electric car, plaintiff claimed that, while he was sitting in a seat facing towards the front of the

to fall. The brakeman testified that in attempting to get on the train she made a short step, and slipped and fell on the step; that he was standing behind her; and that he then assisted her to her feet, and into the car. Held, that plaintiff's testimony, though uncorroborated and flatly contradicted, showed the accident to have been due to the brakeman's negligent conduct, and the case was for the jury. Philadelphia, W. & B. R. Co. v. Alvord, 128 Pa. St. 42, 18 Atl. 391. Plaintiff, attempting to get on a moving street car, fell, and was dragged some distance before the car was stopped. His testimony and that of several witnesses was that the driver paid no attention to him, that the car was moving along in the usual manner, the wheels turning, and that the car was finally stopped by persons on the street catching hold of the horses. The driver testified that the car was on a down grade on a slippery track in the winter time, that he set the brakes as soon as he heard the signal to stop, and that the car slid along the track. Several witnesses testified that in the winter time, when the track was slippery, cars would slide at that place with the brakes set. Held, that the question whether the car slid on the occasion in question was for the jury, and that it was error for the court to charge that the jury must take it as an established fact that in the winter season cars will slide at that point. Woodward v. Railway Co., 71 Wis. 625, 38 N. W. 347. A passenger on an open horse car was kicked by a horse which was led along the track by a man riding another horse, going in the same direction as the car. Plaintiff testified that the driver ran the car against the led horse, causing it to kick him in the left knee. His testimony as to how the horse came to kick was contradicted by all the other witnesses, seven in number; but, of these, two were the driver and the conductor of the car, and the testimony of the others was not positive, and in some particulars not consistent. Held, that a dismissal of the complaint was improper, as the question of the improbability of plaintiff's testimony was for the jury. Walker v. Railroad Co. (City Ct. Brook.) 11 N. Y. Supp. 742. Several witnesses for plaintiff testi-

car, it gave a sudden jerk forward, which threw him out of the side of the car. It was held that such evidence was not sufficient to charge defendant with negligence, as the natural result of such a jerk would be, not to throw plaintiff off, unless he was sitting in a careless manner, but to throw him against the back of the seat in which he was sitting.[2] Plaintiff testified that while stealing a ride, and while standing between two box cars, on a little platform at the bottom of the car, he was kicked in the shoulder by a brakeman

fied that the ties at the point where a derailment occurred were in a very rotten condition, and that the rail was much worn and mashed. The only evidence to rebut this was that of defendant's section boss, who testified that he examined the track a day or so before the accident, and that the rail was sound, but he admitted that one of the ties was somewhat decayed. Defendant did not produce the broken portion of the rail. Held, that a verdict for plaintiff was warranted. Newman v. Railroad Co., 38 Fed. 819. In an action against two railroad companies for injuries to a passenger in a collision at a crossing of their tracks, one of them cannot complain that a verdict against the other was contrary to the evidence; for, if itself guilty of negligence contributing to the injury, it is liable for the entire damage. Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649.

[2] Brennan v. Railroad Co., 12 Misc. Rep. 570, 33 N. Y. Supp. 852. Plaintiff and his father both testified that the train had come to a stop, and started with a sudden jerk just as plaintiff was getting off, throwing him to the ground, and injuring him. Other passengers who got off at the station all united in saying that the train was stopped in the usual way, and that they noticed no unusual motion. Several of them were standing in the car, and experienced no sudden jar or jerk. The violence with which plaintiff and his father were thrown off showed that the train must have been in rapid motion at the time. Held, that the jury was not justified in finding in plaintiff's favor, as it conclusively appeared that he and his father must have been mistaken in their testimony. Ohio & M. Ry. Co. v. Stratton, 78 Ill. 88.

standing on top of the car. It was held that such testimony would not support a verdict in plaintiff's favor, since it was a physical impossibility for a brakeman on a moving car to kick down three feet and three inches, the distance between the top of the car and the position of plaintiff's shoulders.[3] But, where it is undisputed that a passenger was thrown down and injured by a concussion of another car with the one in which he was riding, the fact that experience and the laws of nature demonstrate that he could not have fallen precisely in the manner testified to by him will not defeat a recovery.[4]

§ 504. SAME—BETWEEN WITNESSES FOR SAME PARTY.

A party is not absolutely concluded by the testimony of a witness called in his own behalf, but he may, if he can, contradict him. Plaintiff cannot be nonsuited on the evidence of one of his witnesses (not himself) if he has others who make out for him a case that should go to the jury, unless the result of the whole evidence in his behalf makes it clear that a verdict in his favor cannot be sustained.[1] So, where plaintiff's

[3] Chesapeake & O. R. Co. v. Anderson (Va.) 25 S. E. 947.

[4] Pollard v. Railroad Co., 7 Bosw. (N. Y.) 437. Where plaintiff testifies that a street car on a cable road, when detached from the grip car, did actually move on a down grade while he was attempting to alight, and that such movement threw him to the ground, the question of the probability or possibility of the movement of the car is for the jury; and it is error for the court to direct a verdict for defendant. Finn v. Railway Co., 86 Mich. 74, 48 N. W. 696.

§ 504. [1] Brown v. Barnes, 151 Pa. St. 562, 25 Atl. 144.

own testimony makes out a case in his favor, the case is for the jury, though plaintiff is contradicted by another witness called by himself.[2]

This rule that a party may contradict his own witness has been applied even where he himself is the witness. Plaintiff, a passenger on an open street car, testified that, after the car had come to a full stop, she stepped on the running board, and that, while in the act of alighting, the car suddenly started, throwing her to the ground. Defendant's witnesses testified that plaintiff alighted while the car was slowing up and coming to a stop, and before it had stopped. It was held that, though the jury should be of opinion that plaintiff's evidence as to the car's having come to a full stop might be untrue, yet they could, nevertheless, find in her favor, on the theory that she was injured by the sudden starting of the car after it had begun to slow up.[3] But, though a party, when he takes the stand as a witness in his own behalf, is not absolutely concluded by his own testimony, yet when he testifies in a circumstantial and detailed manner as to a fact peculiarly within his own knowledge, which, if believed, would prevent his recovery, his testimony is certainly not to be entirely disregarded on the mere assumption that he may have been mistaken; especially

[2] Kohler v. Railroad Co., 135 Pa. St. 346, 19 Atl. 1049.

[3] Hill v. Railway Co., 158 Mass. 458, 33 N. E. 582. In determining whether a passenger used reasonable diligence in alighting, the detailed facts testified to by plaintiff as to her movements in leaving the train will warrant the jury in finding in her favor, though she estimates the length of the stop at two or three minutes. Culberson v. Railway Co., 50 Mo. App. 556.

is this true when he is not recalled to explain or retract his statement.[4]

§ 505. SAME—SUFFICIENCY OF EVIDENCE AS TO RELATION OF CARRIER AND PASSENGER.

Evidence that defendant was duly incorporated, had constructed and put in operation a railroad, ran trains and transacted business on it, sold plaintiff a ticket, which was recognized by its conductor in permitting plaintiff to ride thereon without objection, is sufficient to entitle plaintiff to go to the jury on the question whether defendant was a common carrier of passengers.[1] Evidence that a person was expected to arrive home at a certain time; that his route was over defendant's railroad; that a passenger train on defendant's road broke through a bridge, and was precipitated into a rapid and swollen stream; that the deceased's body, horribly mangled, was found two miles down the stream from the place of the accident; and

[4] Sandford v. Railroad Co., 136 Pa. St. 84, 20 Atl. 799.

§ 505. [1] Bixby v. Railroad Co., 49 Vt. 123. In an action for injuries to a passenger on a railroad train, the evidence is sufficient to show that defendant was the carrier, where it appears that plaintiff purchased her ticket from defendant, and that the car in which she was riding had defendant's name on it. Kunzmann v. Railroad Co., 8 Misc. Rep. 689, 29 N. Y. Supp. 327. Where two street railroads are operated in a city over different streets, and the earnings are kept distinct, a passenger on the cars of one company cannot recover for injuries from the other, though that other undertook to compromise plaintiff's claim, though the conductor of the car on which plaintiff was injured could not tell for which corporation he worked, though the same person is manager of both companies, and though the electric power is furnished by one company to the other. Anderson v. Railroad Co. (Iowa) 66 N. W. 64.

that a conductor's check, issued by the conductor of the train, was found on his body,—warrants the jury in finding that he was a passenger on the train.[2] But the mere fact that a passenger was on a steamer when it collided with another and sank in Long Island Sound, and that his body was found in a morgue and identified two days later, does not so conclusively establish that he lost his life in the collision as to warrant the court in directing a verdict in favor of his representatives in an action for his death. The question is, at most, one for the jury.[3]

§ 506. SAME—TAKING CASE FROM JURY.

When there is no evidence tending to prove the facts which the party on whom rests the burden of proof must establish in order to recover, the court is bound, on request, to take the case from the jury, either by directing a verdict in favor of defendant, or by compelling plaintiff to submit to a compulsory nonsuit. In some cases the rule is stated to be that when the evidence at the trial, with all the inferences that the jury could justifiably draw from it, is so insufficient to sup-

[2] Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 456, 8 N. E. 18, and 9 N. E. 357. A letter introduced by defendant stating that plaintiff was thrown from one of "your cars" is sufficient to establish that plaintiff was a passenger on defendant's car, though plaintiff did not testify directly that she was in one of defendant's cars, and though, after the accident, she made a complaint at a stable of another company. Demann v. Railroad Co., 10 Misc. Rep. 191, 30 N. Y. Supp. 926.

[3] Providence & S. S. S. Co. v. Clare's Adm'x, 127 U. S. 45, 8 Sup. Ct. 1094.

port a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.[1] But "there is a difference between the legal discretion of the court to set aside the verdict as against the weight of the evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence. In the latter case, it must be so insufficient in fact as to be insufficient in law, amounting to an absence of any material or substantial evidence which, if credited by the jury, would in law justify a verdict in favor of the other party; and it is not a proper test, of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. It is the duty of the court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that a verdict should be directed, and from that evidence, and the inferences reasonably and justifiably to be drawn from it, determine whether or not, under the law, a verdict might be found for that party."[2] In Massachusetts the rule is stated to be "that if the evidence is such that the court would set

§ 506. [1] Dechert v. Railway Co., 17 Ill. App. 74; Spannagle v. Railway Co., 31 Ill. App. 460.

[2] Mt. Adams & E. P. I. Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463. The court should not direct a verdict in defendant's favor, though the evidence so preponderates in its favor that, had the jury found for plaintiff, the court would have set the verdict aside as against the weight of the evidence. Luhrs v. Railroad Co. (Sup.) 42 N. Y. Supp. 606, 1101, following Bagley v. Bowe, 105 N. Y. 171, 11 N. E. 386.

aside any number of verdicts rendered upon it, toties quoties, then the cause should be taken from the jury by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions." [3] Even a constitutional provision that "judges shall not charge juries with regard to matters of fact, but shall declare the law," does not prevent the court from directing a verdict for defendant, if the evidence is not legally sufficient to sustain a verdict for plaintiff, and plaintiff refuses to submit to a nonsuit.[4]

But a motion to direct a verdict, or a demurrer to the evidence, admits, not only the truth of the facts disclosed by the testimony,[5] but also every inference in favor of plaintiff which could be reasonably deduced from them.[6]

[3] Denny v. Williams, 5 Allen (Mass.) 1, 5. See, also, 2 Thomp. Trials, §§ 2242–2250.

[4] Catlett v. Railway Co., 57 Ark. 461, 21 S. W. 1062.

[5] Mobile & O. R. Co. v. McArthur, 43 Miss. 180; Stone v. Railroad Co., 47 Iowa, 82.

[6] Harris v. Railroad Co., 89 Mo. 233, 1 S. W. 325. In an action for injuries sustained in a fall while stepping from a car step to the station platform, alleged to have been caused by the fact that there was too much space between the car step and the station platform, a nonsuit is properly entered, where the only witness who testified to the space stated that he thought it was about 16 or 18 inches, but he could not tell for sure, and it appears that plaintiff could have shown the exact distance by actual measurement. Rothchild v. Railroad, 163 Pa. St. 49, 29 Atl. 702.

§ 507. SAME—DUTY OF JUDGE ON MOTION FOR NEW TRIAL.

Trial judges possess discretionary power to grant new trials. Hence a trial judge may with propriety grant a new trial in case of serious doubt, as where he is convinced that the jury have not fully comprehended or fairly considered the evidence; and this, even though he might not be justified in directing a verdict upon the evidence.[1] On this subject the supreme court of Kansas has said: "He has the same opportunity as the jury for forming a just estimate of the credence to be placed on the various witnesses; and, if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him it is wrong,—that, whether from mistake or prejudice or other cause, the jury have erred, and have found against the fair preponderance of the evidence,—then no duty is more imperative than that of setting

§ 507. [1] Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

aside the verdict, and remanding the question to another jury." [2]

§ 508. SAME—ON APPEAL.

A verdict cannot be set aside on appeal merely on the ground that it is against the weight of the evidence.[1] "Where there is clear and positive testimony sustaining every essential fact, and the verdict has received the approval of the trial court, the supreme court will not interfere on appeal or on error, even though the testimony seems greatly to preponderate the other way. In other words, in cases brought here on error from a trial upon oral testimony, this court is not a trior of questions of fact." [2] This rule is sometimes put to severe tests in personal injury cases. In one such case plaintiff testified that at about 9 p. m. he got on a wrong train by mistake; that after riding some distance, and after being informed of his mistake by the conductor, a brakeman caused the speed of the train to be slackened, and pushed him off while the train was still in motion; that he fell, and the wheels of the car passed over his left hand; and that he thereafter attempted to walk back to the city, was picked up next morning, and his hand was amputated. The conductor and the trainmen of the train on which plaintiff testified he took passage all swore that no such person as plaintiff was on the train, nor any other

[2] Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145, 171, per Brewer, J.

§ 508. [1] Evansville, R. & E. Ry. Co. v. Harrington, 82 Ind. 534; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32.

[2] Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 168.

person who was not properly on the train. But the conductor of another train which left the station in the afternoon testified that plaintiff was on his train, that he carried plaintiff to the next station, and put him off there safely. This conductor was corroborated by the brakeman and a passenger on the car. Several other witnesses testified that they had seen plaintiff at the station where he was thus put off, during the afternoon after this train had passed; two or three claiming to have last seen him on the track, walking back towards the first station. It was held that there was evidence to support a verdict for plaintiff, and that two juries having found for him, and the trial court having refused to disturb the second verdict, the supreme court could not set it aside.[3]

Owing, no doubt, to cases like these, the general rule first stated in this section has been modified in some of the courts. "While it is true that a verdict will not be disturbed by the supreme court where there is a conflict of evidence, yet, where the verdict is so clearly against the preponderance of the evidence as to amount to a perversion of justice, it will be set aside." [4] "The fact that the weight of the evidence is against a verdict will not of itself justify the reversal of a judgment based thereon, if there be evidence to sustain the verdict. It is only in cases where the verdict is manifestly wrong that the supreme court will disregard it on the ground that it is against the weight of the evi-

[3] Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

[4] Illinois Cent. R. Co. v. Chambers, 71 Ill. 519. But since the creation of the appellate courts in Illinois, the supreme court has no power to pass on questions of fact.

dence." [5] A verdict which has no other support than the testimony of a deeply-interested party to the suit, in opposition to that of five disinterested, intelligent, and unimpeached witnesses, will be regarded as so manifestly against the weight of the evidence that a new trial will be granted.[6]

One of the most remarkable contests between a supreme court and successive juries, or rather plaintiff's counsel, to be found in the books, has recently come to an end in Missouri, and, what is perhaps more remarkable still, the supreme court acknowledged itself vanquished. Plaintiff, a German of mature years, testified that, while riding on a train, the conductor took a seat behind him, and stated to a fellow passenger that he would tie plaintiff, take his money, and throw him out of the car window; and that plaintiff, frightened by these threats, jumped from the car while running 40 miles an hour. Plaintiff was contradicted by

[5] Houston & T. C. Ry. Co. v. Lee, 69 Tex. 556, 7 S. W. 324. This court can interfere with a verdict in an action at law, on the ground that it is against the weight of the evidence, only when it is convinced that the verdict is opposed to all the reasonable probabilities. Such interference is not warranted merely on the ground that the verdict is against the weight of the evidence, though plaintiff's theory and testimony at the trial were not in consonance with admissions made by him in writing shortly after the injury, but not amounting to an estoppel. Wilburn v. Railway Co., 48 Mo. App. 224. Though the testimony of plaintiff in a personal injury case stands alone, and is contradicted by several witnesses, some of whom are disinterested, yet, if his story is not intrinsically improbable or incredible, a verdict in his favor will not be set aside on appeal as clearly against the preponderance of the evidence. Hardy v. Railway Co., 89 Wis. 183, 61 N. W. 771.

[6] Pollard v. Railway Co., 62 Me. 93.

the conductor, and two disinterested persons in the car, as to the making of the threats. The jury returned a verdict for plaintiff. On appeal, the supreme court set it aside as unsupported by the evidence.[7] Black, J., speaking for the majority, said: "Reluctant as we are and should be to interfere in such matters, as this record now stands, we can come to no other conclusion than this: That the verdict is the result of passion or prejudice, or that the instructions given by the court were wholly disregarded. A proper administration of law demands a new trial." The case was accordingly retried, and plaintiff recovered another verdict. The supreme court again set it aside; [8] Barclay, J., saying: "His story certainly borders closely on the marvelous. His account of his experience smacks somewhat of the incredible." The case was again remanded for a new trial, and plaintiff recovered a third verdict. It was again reversed by the supreme court,[9] Gantt, P. J., saying: "The account given of these [threats] by the plaintiff is so utterly at variance with common experience that one must be credulous, indeed, who should believe that they are anything more than the fantastic creations of a disordered brain. His account is so plainly refuted by the disinterested evidence of Connelly and Little that it is beyond comprehension that twelve intelligent jurors should have reached the conclusion they have in this case." The

[7] Spohn v. Railway Co., 87 Mo. 74.

[8] Id., 101 Mo. 417, 14 S. W. 880.

[9] Id., 116 Mo. 617, 22 S. W. 690.

case was again retried, and on substantially similar evidence a fourth verdict in plaintiff's favor was returned. It was finally permitted to stand, the supreme court saying: "There is evidence to support the verdict. The jury are the exclusive judges of its weight and the credibility of the witnesses. Whatever our opinion may have been, or may now be, upon this subject, it cannot stand in the way of the deliberate judgment of that tribunal to whose conscience, under the solemn sanctions of their oaths, the constitution and the laws have intrusted it, rendered without prejudice or partiality, of which, after so many verdicts, there can now no longer remain a shred of suspicion." [10]

In New York, the court of appeals, which is the court of last resort, has no power whatever to review the testimony. But the general term of the supreme court, or the appellate division, as it is now called, which is an intermediate appellate tribunal, has adopted this rule: On appeal from an order denying a new trial, it is the right and duty of the general term to reverse the order when, in its opinion, upon the evidence, the case of the respondent is a fabrication.[11] Hence, where, upon the trial of an action, the testimony of a party is wholly inconsistent with prior statements made by him, a verdict in his favor, unsupported except by such discredited testimony, and opposed by all the other testimony in the case, should not be permitted to

[10] Id., 122 Mo. 1, 26 S. W. 663.

[11] Kummer v. Railroad Co., 2 Misc. Rep. 298, 21 N. Y. Supp. 941.

stand.[12] These rules have been enforced in the cases cited in the note.[13]

[12] Molloy v. Railroad Co., 10 Daly (N. Y.) 453.

[13] Plaintiff testified that, while he was standing on the platform of a street car, and tendering his fare to the conductor, the latter threw him off the car, though there had been no harsh words between them. He was corroborated by his 24 year old son, who was on the platform with him, but who offered no resistance to the conductor. No appeal for help was made to the other passengers, and they were not called on to bear witness to the wrong. Disinterested witnesses testified that, shortly after the accident, plaintiff stated that he fell from the car. Held, that plaintiff's case was a fabrication, and that a verdict in his favor would be set aside on appeal to the general term. Kummer v. Railroad Co., 2 Misc. Rep. 298, 21 N. Y. Supp. 941. Plaintiff, a 17 year old boy, testified that the car on which he was riding came to a full stop at his request, and suddenly started while he was alighting. He was supported by only one witness, who gave a very confused and contradictory account of the accident. The driver and the conductor of the car both testified that plaintiff left the car while in motion, without any request to stop it, and five disinterested eyewitnesses testified that the car did not stop or slacken speed until after the accident. Defendant further proved that plaintiff had made repeated declarations, shortly after the accident, that he had jumped off the car while in motion, as he had done many times before. Held, that a finding by the jury that plaintiff was injured by the sudden starting of the car while attempting to alight was against the weight of the evidence, and a verdict and judgment in his favor would be set aside on appeal. Bernstein v. Railroad Co., 72 Hun, 46, 25 N. Y. Supp. 669. Plaintiff's unsupported testimony that, while trying to enter a car on an elevated railroad, she was pushed over by the guard for a refusal to place a ticket in the ticket box, after she had already deposited a ticket therein, was contradicted by the testimony of six witnesses (three disinterested) that she fell while attempting to get on the train after the gates were closed and the train had started. Held, that a verdict for plaintiff would be set aside on appeal to the general term. Mellwitz v. Railway Co., 62 Hun, 622, 17 N. Y. Supp. 112. Plaintiff testified that his injuries were caused by the sudden starting of the car while alighting. He had himself reported the accident to the company on the day it hap-

In Louisiana, the rule is that on questions of fact, when the evidence is conflicting, and the witnesses of credibility, and the testimony is almost equally balanced, the supreme court will not disturb the verdict of the jury.[14] But "the law of this state imposes on us

pened, and had then made an affidavit that the conductor paid no attention to his signal to stop the car, and that he stepped from it while in motion. The conductor, who had been discharged on account of this accident, also testified that plaintiff stepped from the car in motion. Held, that a verdict in plaintiff's favor would be set aside on appeal. Shultz v. Railroad Co. (Com. Pl.) 2 N. Y. Supp. 693. The only evidence for plaintiff as to the way in which he was injured while a passenger on a ferryboat was his own testimony, which was not clear or very satisfactory, and which contradicted material allegations of his complaint. His account of what he was doing some hours preceding, and of what happened immediately after the accident, was also unsatisfactory, although the injury was not such as to cause his apparent confusion of mind and want of recollection. He was contradicted by several disinterested witnesses as to the circumstances of the accident. One of them testified that, immediately after the accident, plaintiff frequently said it was his own fault, and this plaintiff did not explicitly deny, but he said he had no recollection of the subject. Held, that a verdict for plaintiff should be set aside as against the weight of the evidence. Fash v. Ferry Co., 14 Daly (N. Y.) 250. A verdict in plaintiff's favor will be set aside where her account of the accident is confused and contradictory, and a written statement made by her shortly after the accident varies from her testimony at the trial. Schulz v. Railway Co. (Sup.) 42 N. Y. Supp. 710. But plaintiff's testimony that a street car was stationary when he attempted to board it will support a verdict in his favor, though he is contradicted by the conductor and another passenger, who testified that the car was moving at full speed when plaintiff got on, and though a statement prepared by one of the company's employés, and signed by plaintiff, corroborates the conductor, where plaintiff testifies that he did not know the contents of the statement when he signed it. Pohle v. Railroad Co. (Sup.) 42 N. Y. Supp. 1002.

[14] Odom v. Railroad Co., 45 La. Ann. 1201, 14 South. 734.

the duty of reviewing their verdicts both on the facts and on the law; and, when the evidence submitted to us manifestly fails to support the verdict, we are bound to reverse it." [15]

[15] Olivier v. Railroad Co., 43 La. Ann. 804, 9 South. 431. The evidence of plaintiff and a companion that he was jolted from the steps of a car by a violent jerk of the engine after it had slowed down at a station will not sustain a verdict in his favor, where the engineer denies that he gave the train any forward motion after slowing down, and where plaintiff, immediately after the accident, stated to several disinterested witnesses that he was hurt in an attempt to jump from the train while in motion. Id.

CHAPTER XXXV.

PRACTICE.

§ 509. Jurisdiction and Venue.
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§ 509. JURISDICTION AND VENUE.

The common-law rule is that, where the right of action is transitory in its nature, courts everywhere, where the defendant may be lawfully summoned to appear therein, have jurisdiction; and, when the suit is governed by statute of the state in which the injury is committed, courts of another state having similar laws, or where it is not contrary to its public policy, will enforce such law by the rule of comity.[1] In Michigan, however, it has been held that the exercise of such jurisdiction by foreign courts can only be obtained

§ 509. [1] St. Louis & S. F. Ry. Co. v. Brown, 62 Ark. 254, 35 S. W. 225. Hence a citizen of the Indian Territory may sue in Arkansas for a wrongful ejection from a train in Missouri, where the Missouri statute on the subject is similar to the one in Arkansas. Id. The fact that a contract for passage was made in another state does not

as a matter of comity; and when, by the pleadings or on the trial, it appears that tribunals of one state are resorted to for the purpose of adjudicating upon mere personal torts, committed abroad, between persons who are all residents where the tort was committed, the court may properly decline to proceed further.[2] But as to torts arising on a navigable river forming the boundary between two states, the courts of each state have concurrent jurisdiction. This jurisdiction is general, and includes the right of legislation, touching all civil and criminal cases on the river. Hence a statute of Indiana giving a right of action for wrongful death applies to cases of death occurring on the Ohio river, where that river forms the boundary line of the state.[3]

A corporation may be sued, in the state where it was incorporated, for an injury to a passenger occurring in another state while it was operating its train over the track of a foreign company.[4] But, as a gen-

prevent the passenger from suing in Indiana for personal injuries received there through the carrier's negligence. Indiana, I. & I. R. Co. v. Masterson (Ind. App.) 44 N. E. 1004.

[2] Great Western Ry. Co. v. Miller, 19 Mich. 305.

[3] Sherlock v. Alling, 44 Ind. 184. Under Civ. Code Ky. § 73, which requires an action against a carrier for injury to a passenger to be brought in the county in which defendant resides, or in the county where the injury occurred, or in the county in which plaintiff resides, an action for personal injury to a passenger cannot be brought in a county which is neither the residence of any of the parties, nor the place where the injury occurred. Sherrill v. Railway Co., 89 Ky. 302, 12 S. W. 465.

[4] Eureka Springs Ry. v. Timmons, 51 Ark. 459, 11 S. W. 690. One who is injured in a railroad wreck in Mexico may maintain an action against the railroad company in Texas, where it has its legal

eral rule, corporations cannot be sued in the courts of a state other than that of their incorporation, except on causes of action arising within such other state, or on contracts entered into in reference to a subject-matter within that state. To hold otherwise would be to allow foreign corporations to be drawn into the courts of the state in which they transact business for the adjudication of every contract they may make, and of every tort and wrong they may be charged with committing, even in the state which gave them being.[5] But under a statute authorizing suit to be brought within the state on all claims against a foreign corporation doing business within the state, it may be sued here by a foreign administrator for the death of a passenger in the state where it was chartered.[6] So, in Virginia, it has been held that by leasing a railroad lying within the state, and operating it as owner, a foreign railroad becomes subject to suit in the state courts for an injury which occurred on the leased road, and that the foreign company had no right to remove the suit to the federal courts.[7]

domicile, though it does not appear that an action would lie against the company in Mexico. Such an action is transitory in its nature, and may be brought anywhere and everywhere. Mexican Cent. Ry. Co. v. Mitten (Tex. Civ. App.) 36 S. W. 282.

[5] Central Railroad & Banking Co. v. Carr, 76 Ala. 388. It was accordingly held that a foreign railroad company doing business in Alabama cannot be sued in the courts of that state by a citizen of another state for an injury sustained without the state, though he was at the time being carried as a passenger to a point in Alabama.

[6] South Carolina R. Co. v. Nix, 68 Ga. 572.

[7] Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. (Va.) 394. Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Grat. (Va.) 431.

§ 510. LIMITATION OF ACTIONS.

In New York it is held that the liability of a carrier to a passenger injured in consequence of some defect in the vehicle is based solely on negligence, and the three-year limitation fixed by statute [1] for the bringing of an action to recover "damages for a personal injury resulting from negligence" applies. It is immaterial whether the action is in form ex contractu or ex delicto. Where the source of the injury complained of is negligence, the action is barred if not commenced in three years.[2] This statute likewise applies to a cause of action by a husband for loss of services of his wife because of personal injuries to her caused by defendant's negligence.[3]

The law of the forum governs as to the statute of limitations, where the right of action exists at common law. Hence a citizen may sue for a personal injury in the courts of his state, until barred by the statute of that state, though the injury occurred in another state, by the statute of which it would be barred if suit were brought there.[4]

An amended complaint has, ordinarily, relation to the date of the commencement of the action, and is regarded as a matter occurring in the continuation or

§ 510. [1] Code Civ. Proc. § 383, subd. 5.

[2] Webber v. Railroad Co., 109 N. Y. 311, 16 N. E. 358; affirming 35 Hun (N. Y.) 44.

[3] Maxson v. Railroad Co., 112 N. Y. 559, 20 N. E. 544; reversing 48 Hun (N. Y.) 172, overruling Groth v. Washburn, 34 Hun (N. Y.) 509.

[4] Williams v. Railway Co., 123 Mo. 573, 27 S. W. 387.

progress of the original cause. Unless, therefore, some new claim or title, not previously asserted, is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced.[5] An amended complaint which proceeds on the theory that plaintiff was expelled from a train with unnecessary force involves the same transaction as the original complaint, which proceeded on the theory that he was wrongfully expelled from a train on which he had a right to be; and hence the fact that the statute of limitations had run when the amended complaint was filed is immaterial, where it had not run when the original was served.[6]

§ 511. SURVIVAL OF CAUSE OF ACTION.

As a general rule, at common law a cause of action arising out of contract survived, on the death of the parties, to their personal representatives; while causes of action in tort did not survive. It seems to be settled by the decisions that a cause of action for personal injuries to a passenger, in form for breach of the contract to carry, will survive the death of the passenger, not resulting from the injury, though it would not if the action were formally in tort.[1] So where a passenger is assaulted by the driver of a street car, and

[5] School Town of Monticello v. Grant, 104 Ind. 168, 1 N. E. 302; Evans v. Nealis, 69 Ind. 148; Sidener v. Galbraith, 63 Ind. 89.

[6] Chicago, St. L. & P. R. Co. v. Bills, 118 Ind. 222, 20 N. E. 775.

§ 511. [1] Kelley v. Railway Co., 16 Colo. 455, 27 Pac. 1058; Pittsburgh City v. Grier, 22 Pa. St. 65; Nevin v. Car Co., 106 Ill. 222; Staley v. Jameson, 46 Ind. 159; Lemon v. Chanslor, 68 Mo. 353; 3

thrown therefrom, and under the wheels, receiving injuries of which he dies, the personal representative may sue the company in an action for breach of contract, though the Kentucky statute provides that causes of action for assault and battery shall not survive.[2]

An action by a husband against a carrier of passengers, to recover for loss of services of his wife, and for expenses paid, in consequence of injuries to her person, resulting from defendant's negligence, is an action of tort, and would at common law abate at the death of the husband. Under the Revised Statutes of New York, however, it survives to his personal representatives.[3]

In an action for personal injuries, a stipulation signed by defendant's attorneys, as a condition for obtaining a continuance, that in case of plaintiff's death the action should not abate, but might be continued in the name of his personal representatives, is not against public policy, and is such a condition as the court had power to impose, and is therefore binding on defend-

Suth. Dam. pp. 249, 259, 268; Patt. Ry. Acc. Law, § 349. Under McClel. Dig. Fla. p. 830, § 77, which provides that all actions for personal injuries shall die with the person, an action in tort by a passenger for personal injuries cannot be revived, after his death, by his administratrix. Jacksonville St. Ry. Co. v. Chappell, 22 Fla. 616, 1 South. 10.

[2] Winnegar's Adm'r v. Railway Co., 85 Ky. 547, 4 S. W. 237.

[3] Cregin v. Railroad Co., 75 N. Y. 192. It is within 2 Rev. St. N. Y. p. 447, § 1, preserving from abatement actions "for wrongs done to the property rights and interests of another," and is not included in the exception of section 2, of actions on the case for injuries "to the person of the plaintiff." Id.

ant.[4] But an appellate court, in granting a new trial for error of law occurring at the trial, cannot impose any conditions; for example, that, in view of plaintiff's approaching death, the action should not abate by reason of his death. Such a condition could be imposed if defendant were asking for a new trial as a matter of favor, or if the new trial rested in the discretion of the court. But when a party asks a new trial as a matter of right, because some legal error was committed on the trial, the court has no discretion to grant or withhold it; but, finding error, is bound to reverse the judgment, and grant a new trial, without imposing such a condition.[5]

§ 512. COMPETENCY OF JURORS.

Stockholders and near relatives of stockholders in a railroad corporation are not competent jurors in an action against the corporation.[1] Neither is an employé of the corporation; and he should be rejected as a juror, though he has the self-confidence to swear that he can try the case impartially.[2] But the mere fact that jurors on a second trial of a personal injury suit know the amount of the first verdict does not render them incompetent; and it is immaterial that such knowledge was obtained from the newspapers while the second trial was in progress.[3]

[4] Cox v. Railroad Co., 63 N. Y. 414, reversing 4 Hun (N. Y.) 176, 6 Thomp. & C. (N. Y.) 405.

[5] Anderson v. Railroad Co., 54 N. Y. 334.

§ 512. [1] Georgia R. R. v. Cole, 73 Ga. 713.

[2] Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360.

[3] Sherwood v. Railway Co., 88 Mich. 108, 50 N. W. 101.

§ 513. ARGUMENT OF COUNSEL.

The argument of counsel in addressing a jury should be confined to a discussion of the facts in evidence; and when language is used relating to matters not in evidence, and of a character calculated to influence and prejudice the minds of the jurors against the adverse party, without any attempt by the court to control counsel, the judgment will be reversed, especially in a case where the verdict seems excessive.[1] A judicial trial means a fair trial, and a verdict given upon a trial rendered unfair by statements or conduct of counsel cannot be sustained.[2] In New Hampshire a verdict will be set aside for unwarranted remarks of counsel to the jury in closing, unless the presiding justice finds, as matter of fact, that the jury were not influenced thereby, or that the effect upon their minds was wholly removed by a retraction of counsel, the charge of the court, or in some other way.[3]

Instances where verdicts have been vitiated by improper remarks of counsel in his argument to the jury

§ 513. [1] Galveston, H. & H. R. Co. v. Cooper, 70 Tex. 67, 8 S. W. 68. Whenever, in the argument of a case, counsel departs from the record, and uses improper language that is calculated to influence the jury in rendering a verdict larger in amount than they might otherwise do, and the court does not instruct them to disregard the improper language in considering their verdict, and the verdict is such that it indicates that such language did probably affect them in their action in arriving at a verdict, the case will be reversed and remanded for a new trial. Dillingham v. Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074.

[2] Baldwin v. Railway Co., 64 N. H. 596, 15 Atl. 411.

[3] Bullard v. Railroad, 64 N. H. 27, 5 Atl. 838.

are quite frequent in American jurisprudence. In an action against a railroad company for personal injuries, counsel for plaintiff should not travel outside the record to refer to Jay Gould and modern railroad economics.[4] Where an order for the physical examination of plaintiff is obtained without any objection on her part, and the physicians testify to the result at the trial, it is reversible error for plaintiff's counsel in his closing argument to denounce the order of the court and the examination as an outrage, if the trial court does not suppress nor control the attorney, nor attempt to do so.[5] A new trial will be granted for the misconduct of the attorney of the prevailing party in offering prejudicial and incompetent evidence, and in persisting in discussing the same in his argument to the jury, though his offer was ruled out, and in still persisting in discussing it, notwithstanding the ruling of the court that he should not do so.[6] So it is error for the court

[4] Williams v. Railway Co., 123 Mo. 573, 27 S. W. 387. In an action by a passenger for personal injuries, a statement by plaintiff's counsel that the law permits excessive passenger charges, so that the railroad company may accumulate a fund for payment of claims for injuries to passengers, is improper, and requires the granting of a new trial. Norton v. Railway Co., 40 Mo. App. 642. It is improper for counsel, in arguing a personal injury case against a railroad company, to say to the jury: "I have no fault to find with the railroad company, except they will murder people and kill innocent women and children sometimes." Pittsburg, C., C. & St. L. Ry. Co. v. Story, 63 Ill. App. 239.

[5] Gulf, C. & S. F. Ry. Co. v. Butcher, 83 Tex. 309, 18 S. W. 583.

[6] Belyea v. Railway Co., 61 Minn. 224, 63 N. W. 627. Where an attorney deliberately argues on matters outside of the record, and persists in so doing after repeated objections by opposing counsel, and in the face of admonitions by the trial court, the appellate court

to permit counsel for plaintiff in argument, over the objection of defendant, to read to the jury, on the question of the measure of damages, extracts from reported cases, showing large damages not excessive.[7]

But in an action for the expulsion of a passenger, attended with aggravating circumstances, a verdict for plaintiff will not be set aside, because his counsel, in addressing the jury, said: "And so I think, gentlemen of the jury, that the conduct of this conductor and these railroad employés shows that they have become like the corporation for whom they work; that they have become so hard-hearted and unfeeling that they have no charity for their fellow men." [8] So, opprobrious epithets applied by counsel in his closing argument to witnesses of the opposite side are no ground for a new trial, where there is evidence to warrant their application, though the trial judge does not instruct the jury to disregard them.[9]

will reverse a judgment in his favor, though the jury has been instructed by the court to disregard the remarks. Wilburn v. Railway Co., 48 Mo. App. 224.

[7] Ricketts v. Railway Co., 33 W. Va. 433, 10 S. E. 801. Where a jury has neglected to answer special questions submitted to them, it is reversible error for the counsel for the successful party to instruct them that they should make such answers conform to the general verdict. Brassel v. Railway Co., 101 Mich. 5, 59 N. W. 426.

[8] Lake Erie & W. Ry. Co. v. Close, 5 Ind. App. 444, 32 N. E. 588.

[9] Cawfield v. Railway Co., 111 N. C. 597, 16 S. E. 703. Where the evidence shows that the motoneer in charge of an electric car was discharged three weeks after an accident to his car, it is not improper argument for plaintiff's attorney to draw the inference from such facts, and to argue to the jury, that the discharge of the motorman was on account of his carelessness at the time of the accident. Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081.

It would also seem to be a sound rule that, when unfair argument is used in response to a similar argument used by the adverse counsel, and equally unauthorized, the party provoking such a course of argument will not be heard to complain on appeal.[10]

So the taint of the unfair argument may be removed by the action of the trial judge. "It is the settled doctrine of this court that proceedings thus infected with error by argument outside of the record may be purged of the infirmity by disclaimer and withdrawal on the part of counsel, and care on the part of the court in cautioning the jury against according to them any consideration or influence." [11] Thus the unjustifiable remarks of counsel in traveling outside of the record to discredit a witness for the opposite party is no ground for reversal, where the trial judge promptly rebukes counsel, charges the jury to treat the statement as untrue, and it does not appear that any injury resulted to the adverse party.[12]

Before an appellate court will review arguments of counsel, it must appear in the record that a proper objection was taken at the trial to such remarks, and an exception saved to the ruling of the court thereon. A

[10] Texas & P. Ry. Co. v. Garcia, 62 Tex. 285.

[11] Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 9 South. 303.

[12] Joliet St. Ry. Co. v. Call, 143 Ill. 177, 32 N. E. 389; Id., 42 Ill. App. 41. Counsel who admit what facts an absent witness would testify to in order to prevent a continuance have no right to comment unfavorably on the absence of such witness; but, where the judge instructs the jury to disregard such comment, and counsel for the opposite side has an opportunity afterwards to address the jury, such misconduct is no ground for reversal. Straus v. Railroad Co., 86 Mo. 421.

court may interfere and stop the argument of counsel when he is discussing matters outside of the case, without objection or suggestion from opposing counsel; and such action will be sustained, unless there is a gross abuse of discretion. But a failure on the part of the court to interfere when opposing counsel are present, and do not ask the interposition of the court, or object to the line of argument pursued, will not entitle the party represented by such opposing counsel to a new trial.[13] So it is not sufficient for the bill of exceptions to show, after the alleged improper remarks, "Excepted to by counsel," where nothing is shown that any exceptions were interposed, or that the court was called upon to make any ruling to which the exceptions could apply.[14]

Further than this, the objections must be renewed on motion for a new trial, in order to allow the court before which the matter transpired an opportunity of passing on the question.[15]

[13] St. Louis & S. E. Ry. Co. v. Myrtle, 51 Ind. 566; Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. 701.

[14] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899. In his argument, counsel for plaintiff severely criticised defendant's witnesses. No exceptions to the argument were taken at the time, but, by permission of the court, they were made to the reporter. In the charge the court said: "I do not see any occasion for any criticism on the defense made in the case. It was perfectly legitimate, and, if it satisfies you, it must be final; but you are the sole judges upon that subject." Held that, upon the record as made, the argument was not ground for reversal. Phippen v. Railway Co. (Mich.) 68 N. W. 216.

[15] Honeycutt v. Railway Co., 40 Mo. App. 674; International & G. N. Ry. Co. v. Irvine, 64 Tex. 529.

§ 514. INSTRUCTIONS—PROVINCE OF JURY.

A wide diversity of authority exists as to the right of the trial judge to comment on the weight and value of evidence in his instructions to the jury. In the courts of the United States, as in those of England, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion on the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.[1] So, in Pennsylvania, a trial judge may express his opinion freely on the weight and value of evidence; and, when he does so without misleading or controlling the jury in the disposition of the facts, there is no ground for reversal.[2] But in most of the American states the rule is the other way, and the trial judge is prohibited by

§ 514. [1] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1.

[2] Fredericks v. Railroad, 157 Pa. St. 103, 27 Atl. 689. Where the evidence justifies it, a judge is under no obligation to abstain from an expression of opinion that the testimony of two witnesses, when compared with the events, could not have been true. McClintock v. Railroad Co., 21 Wkly. Notes Cas. (Pa.) 133. Where, in an action by a passenger against a street railroad for personal injuries, the trial judge has fully stated all the direct evidence bearing upon the accident, a judgment on a verdict for defendant will not be reversed because the judge failed to refer to rebuttal evidence of a minor character, and to the effect that one of the witnesses to the direct occur-

statute or constitution from charging juries in respect to matters of fact.[3]

There is also a decided conflict of authority as to the judge's duty in charging on the question of negligence. In Pennsylvania it is held that, where the question of contributory negligence is fairly raised upon the evidence, it is not enough to charge generally that plaintiff cannot recover if guilty of contributory negligence, but it is the duty of the court to explain to the jury, in view of the evidence, what would constitute contributory negligence, and then to instruct them that if they find such facts in the case plaintiff cannot recover, if the accident resulted wholly or in part from such contributory negligence.[4] On the other hand, in Nebraska, it is held to be improper for the judge to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amount to negligence per se. At most, the jury should be instructed that such circumstances, if established by a prepon-

rence had elsewhere stated the matter differently from his testimony at the trial. Winther v. Railway, 159 Pa. St. 628, 28 Atl. 472.

[3] 2 Thomp. Trials, § 2280 et seq.; Moore v. Railroad Co., 38 S. C. 1, 16 S. E. 781.

[4] New York, L. E. & W. R. Co. v. Enches, 127 Pa. St. 316, 17 Atl. 991. It is not error for the judge, after stating the facts on which the plaintiff based her right of recovery, and which, if true, warranted him in directing a verdict in her favor, to instruct the jury that if they found, from a fair preponderance of evidence, that such facts were established, plaintiff is entitled to recover. Sherwood v. Railway Co., 88 Mich. 108, 50 N. W. 101.

derance of the evidence, are properly to be considered in determining the question of negligence.[5]

§ 515. SAME—ASSUMING FACTS AND SINGLING OUT TESTIMONY.

The court may in its instructions to the jury assume the truth of a proposition which is established by the undisputed testimony, but it is manifestly improper to do so where there is any conflict in the evidence. Thus, where the evidence is conflicting as to whether plaintiff was injured in the spine and hips from a fall in a hole of a station platform, it is error for the court in its charge to the jury to assume that he was so injured.[1] So, where the issue is whether a passenger rightfully left his car, and took a position between the main and side tracks, when he was injured by another train on the side track, it is error for the court to charge that

[5] Missouri Pac. Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913. In an action against a street-railway company for damages caused by defendant's negligence in starting the car while plaintiff was alighting, an instruction that certain acts of plaintiff were "all that the law required of her, so far as diligence on her part in getting off the car is concerned," and that under such circumstances the starting of the car is an act of negligence, is erroneous, as being a comment on the evidence. Blair v. Railway Co., 31 Mo. App. 224. In an action for injuries to a passenger, it is erroneous to recite to the jury a number of precautions which the defendant might have taken, and then instruct them that they might determine whether any of such precautions were reasonable, and that, if they were, the omission to take them would be negligence. Buck v. Railway Co. (Com. Pl.) 6 N. Y. Supp. 524. See, also, ante, § 28.

§ 515. [1] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587.

"plaintiff was rightfully in the space between defendant's tracks." [2]

An instruction that the jury may take into consideration plaintiff's interest in the result of the suit in weighing the testimony is properly refused, as singling out the plaintiff, when the same test of credibility is applicable to other witnesses in the case.[3]

§ 516. SAME—PLEADING AND EVIDENCE TO SUPPORT.

Instructions must be based on the pleadings and evidence in the case. Instructions which authorize a jury to find a verdict against a railroad company on negligence not charged in the declaration are erroneous.[1] So, where the declaration alleges that plaintiff was thrown, while alighting from a train, by a sudden jerk of the engine, an instruction that she can recover if she used reasonable care in alighting is error.[2] So, where

[2] Chicago & A. R. Co. v. Rayburn, 153 Ill. 290, 38 N. E. 558. Plaintiff testified that, as she was about to ascend the steps of a car, a brakeman sprang on the steps in front of her, and the start he gave her caused her to fall. Held, that it was error to submit to the jury, as a fact in evidence, that plaintiff testified that she was pushed or jostled by the brakeman. Philadelphia, W. & B. R. Co. v. Alvord, 129 Pa. St. 42, 18 Atl. 391.

[3] Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N. E. 540; Id., 41 Ill. App. 345.

§ 516. [1] Chicago & A. R. Co. v. Rayburn, 153 Ill. 290, 38 N. E. 558.

[2] Cincinnati, L., St. L. & C. R. Co v. Dufrain, 36 Ill. App. 352. A passenger, who was awakened when the train approached his destination, refused to get off, and the conductor did not deem it safe to put him off, because he was intoxicated, and he was carried along to another station. The next day he boarded another train to return to his destination, and was ejected for his refusal to pay fare. Held,

the sole justification attempted by defendant, in its pleadings and at the trial, of the action of its employés in pulling plaintiff from a train already in motion, is that it was taken with a view to the personal safety of plaintiff himself, the court rightfully refused a request that defendant had a right to prevent plaintiff from entering the train because his intoxication rendered him unfit to be a passenger.[3]

But the giving of an instruction which has no evidence to support it is not prejudicial error, where it is correct as an abstract proposition, and was not objected to on the ground that it was unsupported by the evidence.[4]

§ 517. SAME—DEFINING AND PRESENTING ISSUES.

It is the duty of the trial judge to construe the pleadings, and to clearly define and distinctly state to the jury the issues submitted to their determination. The trial judge cannot perform, or rather evade performance of, this duty by merely referring the jury to the

in an action for such ejection, where no claim is made for carrying him beyond his destination the day before, that the court erred in instructing that defendant was liable if it negligently carried plaintiff beyond his destination, and did not give him fair warning of the train's arrival. Louisville & N. R. Co. v. Lewis (Ky.) 21 S. W. 341. Where the complaint alleges, and plaintiff testifies positively, that a street car had stopped before she attempted to alight, instructions that she could recover if the car was moving slowly, and was started forward with a jerk, while she was alighting, should not be given. Gilbertson v. Railway Co., 14 App. Div. 294, 43 N. Y. Supp. 782.

[3] Harrold v. Railroad Co., 47 Minn. 17, 49 N. W. 389.

[4] McLaughlin v. Railroad Co. (City Ct. Brook.) 12 N. Y. Supp. 453.

pleadings to ascertain the issues. Such action on the part of the trial judge constitutes reversible error.[1]

The court should also present to the jury all the issues in the case. In an action for personal injuries, where defendant introduces a large amount of testimony to show that plaintiff's ill health is due to a disease of long standing, and not to the accident alleged, it is error for the court to ignore this question in its charge to the jury.[2] So, where the testimony of plaintiff is so important that his case may turn upon it, and his credibility is attacked by the testimony of witnesses called to impeach him, it is error for the trial court to give the jury no instructions on the subject.[3] So it is error for a court to enumerate a number of acts of plaintiff, suing for personal injury, which it is claimed

§ 517. [1] Railway Co. v. Lee, 90 Tenn. 570, 18 S. W. 286; Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646; Bryan v. Railway Co., 63 Iowa, 464, 19 N. W. 295.

[2] Herstine v. Railroad Co., 151 Pa. St. 244, 25 Atl. 104.

[3] Id. Plaintiff had fallen from the roof of a two-story building, and sustained spinal injuries. Five months later, when he had recovered to some extent, but before he had resumed work of any kind, he rode on a street car, which collided with another car. The jar did not jostle any of the passengers from their positions, but plaintiff, standing on the rear platform, was thrown forward against the glass window in front of him, and the skin was broken along the ridge of his nose by contact with the glass. No other injury was visible, but plaintiff claimed that the spinal disease was renewed by the jolt, and the jury awarded him $27,000 damages against the street-car company. Held, that the judgment would be reversed for the failure of the trial judge to present clearly the issues involved, and to adequately present any of them. Tietz v. Traction Co., 169 Pa. St. 516, 32 Atl. 583.

by defendant might have contributed to the injury, and to omit the mention of other acts equally well established, and equally likely to have affected plaintiff.[4] So, where the petition claims exemplary damages, and the evidence does not warrant the claim, it is the duty of the trial court, in its instructions, to withdraw the claim from the jury; and its error in failing so to do is not cured by a mere declaration of plaintiff's counsel, in his argument to the jury, that the claim for exemplary damages is waived.[5] But in an action where the issue is whether plaintiff negligently jumped from a car in motion, and thus injured himself, it is not necessary for the judge to charge that plaintiff's negligence must have "proximately" contributed to her injury in order to bar a recovery, since there could be no question but what her negligence, if any, was the proximate cause of the injury.[6]

§ 518. SAME—AS TO DAMAGES.

The expression, "Money is an inadequate recompense for pain," though not appropriate in a charge to the jury, is not ground for reversal, where the whole charge proceeds on the theory that only compensatory damages can be recovered.[1] Nor is an instruction that the question of damages "is wholly and entirely in the province of the jury," if the trial judge follows the

[4] Missouri, K. & T. Ry. Co. v. Simmons (Tex. Civ. App.) 33 S. W. 1096.

[5] International & G. N. Ry. Co. v. Underwood, 64 Tex. 463.

[6] Craven v. Railroad Co., 72 Cal. 345, 13 Pac. 878.

§ 518. [1] Morgan v. Southern Pac. Co., 95 Cal. 501, 30 Pac. 601.

phrase complained of, immediately and in the same sentence, by a specific enumeration of the items of damages, and concludes with the direction that "all these, taken together, would be the amount the plaintiff is entitled to recover." [2] But it is error for the court, after instructing the jury as to the measure of damages for personal injuries, to go on and say: "If you can find any better ones than those suggested, you are at liberty to adopt them, as the measure and amount of damages are entirely for you to ascertain, under all the evidence and circumstances in the case." [3]

Where a passenger seeks to recover for several injuries sustained in a railway accident, it is error to instruct that unless a certain specified one of the injuries was caused in whole or in part by the accident plaintiff could not recover, though the jury were told in another instruction that, if they found for plaintiff, they should award him such damages as would compensate him for all injuries suffered.[4]

[2] McCloskey v. Railroad, 156 Pa. St. 254, 27 Atl. 246.

[3] Pennsylvania R. Co. v. Books, 57 Pa. St. 339. In an action for personal injuries to a passenger, the court charged: "It is, of course, difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured for any amount of money. But it is the duty of the jury, if they find for the plaintiff, to fix some sum which would be in compensation for this pain and suffering." Held error, as its effect was to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering complained of, as a measure of damages for having been subjected to it. Such a standard is inapplicable in actions for personal injury not wantonly inflicted. Baker v. Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979.

[4] Moore v. Railroad Co., 69 Iowa, 491, 30 N. W. 51; Graham v. Railway Co., 39 Minn. 81, 38 N. W. 812.

§ 519. SAME—CONSTRUCTION AS A WHOLE.

A judgment will not be reversed for the giving of an imperfect instruction which is supplemented by some other instructions in the series, so that the instructions, taken together, present the case fairly to the jury, and in a manner not calculated to mislead them.[1] Hence, in an action for injuries grounded on negligence, where the question of contributory negligence is also in issue, an instruction which presents a hypothetical state of facts, and authorizes a recovery by plaintiff, without including a qualification that the jury must find plaintiff free from contributory negligence, is no ground for reversal, where a separate instruction correctly states the law of contributory negligence.[2] An instruction that coupling cars in such a manner that they strike together with such force as to injure passengers sitting therein renders the company liable for the injuries is no ground for reversal, where, in other parts of the charge, the court repeatedly stated that plaintiff cannot recover unless the injury was the result of negligence on the part of the defendant.[3]

§ 519. [1] Reilly v. Railroad Co., 94 Mo. 600, 611, 7 S. W. 407.

[2] Owens v. Railroad Co., 95 Mo. 169, 8 S. W. 350, overruling Sullivan v. Railway Co., 88 Mo. 182. See, also, Wilburn v. Railway Co., 36 Mo. App. 203; Lake Erie & W. R. Co. v. Morain, 140 Ill. 117, 29 N. E. 869.

[3] McCloskey v. Railroad, 156 Pa. St. 254, 27 Atl. 246.

§ 520. SAME—REQUESTS AND EXCEPTIONS.

Without any request of counsel, or reminder of the court by counsel, the instructions of the court must substantially embrace the rule of law on the issues between the parties which the evidence makes.[1] If that be done substantially, then, if the charge be not full enough and clear enough, or omits something that would put one side or the other more fairly before the jury than the charge given does, the attention of the court must be called thereto, or the party complaining will not be heard on appeal.[2] Where the court's charge is correct in the abstract, defendant must request a more specific instruction if it believes the jury will be misled by the general language of the charge.[3]

Where a request prays for instructions upon the legal effect of certain facts therein stated, which are supported by evidence in the case, it is error to answer the point by simply submitting the facts to the determination of the jury, without giving them any instructions as to their duty in case they should find the facts

§ 520. [1] Central R. R. v. Harris, 76 Ga. 501; Herstine v. Railroad Co., 151 Pa. St. 244, 25 Atl. 104.

[2] Central R. R. v. Harris, 76 Ga. 501.

[3] Fordyce v. Jackson, 56 Ark. 596, 20 S. W. 528, 597. Mere ambiguity in instructions is no ground for reversal where none have been requested, unless there is good reason to believe that the jury has in fact been misled. Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382. As a general rule, when specific instructions are not requested by a proper point, and no exception is taken to such as were given, there is no error for correction. Germantown Pass. Ry. Co. v. Walling, 97 Pa. St. 55.

to be as stated.[4] So a general charge that contributory negligence will defeat a recovery is not sufficient to warrant the court in refusing a requested instruction enumerating the facts established by the evidence, and stating that, if the jury believed that they showed plaintiff did not use reasonable care, she could not recover.[5] But a party has no right to insist that instructions requested by him should be given as asked; and the judge has a right to modify them as he pleases, provided that they correctly state the law as modified.[6] Instructions offered by the parties, but amended by the court before being given, are to be considered as if given by the court of its own motion; and the fact that counsel read them to the jury will not operate as a waiver of exceptions duly taken to the action of the court.[7] But a party will not be heard on appeal to claim that the trial court compelled him to adopt its theory of the case by suggesting that, if he would prepare and ask certain instructions, they would be given, since it is the duty of a party to ask instructions presenting his theory of the case, and, if they are refused, to save his exceptions.[8] So a party who himself requests the court to instruct the jury on a certain subject cannot afterwards be heard to say that such subject was not in the case at all. He may challenge the correctness of the findings of the jury on the question of fact submitted to them by the instructions, but he cannot be heard to say that it was

[4] Ham v. Canal Co., 142 Pa. St. 617, 21 Atl. 1012.

[5] Gulf, C. & S. F. R. Co. v. Flatt (Tex. Civ. App.) 36 S. W. 1029.

[6] Boyce v. Stage Co., 25 Cal. 460.

[7] Swigert v. Railroad Co., 75 Mo. 475.

[8] Sharp v. Railway Co., 114 Mo. 94, 20 S. W. 93.

error for the court to comply with his own request in submitting the question to the jury.[9]

Where a court has assumed to incorporate in its charge to the jury several requested instructions, and has announced to counsel that such requested instructions have been given, an exception to "any qualification" of the requested instructions is not sufficient to call attention to the fact that a qualifying word has been added in giving one of such requests.[10]

Where no exceptions are taken to the charge of the court, the charge becomes the law of the case upon appeal in the consideration of the evidence to support the verdict.[11]

[9] Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7. While it is true that interest affects the credibility of a witness, and it is proper that the court in its charge should call the attention of the jury to that fact, yet where it has done so in its general charge, and has also, at the instance of one party, given a special instruction to the same effect, it is seldom error to refuse an additional instruction asked by the same party, stating the law in stronger and more emphatic language. Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145.

[10] Bishop v. Railway Co., 48 Minn. 26, 50 N. W. 927. On a request for instructions by defendant, the judge stated that he would qualify one instruction, and counsel stated that he would take no exception to the qualification. When the judge charged the jury, he stated the qualification in writing; and defendant then said he took exception. The judge thereupon remarked that, if defendant would point out wherein the written statement of the qualification differed from the oral statement of it assented to, the court might revise the phraseology, but defendant declined to suggest any change. Held, that the refusal of defendant to point out the alleged variance was a waiver of any right of exception. Coleman v. Railroad Co., 106 Mass. 160.

[11] Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018.

§ 521. VERDICT.

The verdict must pass on all the issues in the case, and must be intelligible. In an action against two railroad companies, a verdict, "We, the jury, find for the plaintiff against the G. Co., find for S. Co. damages to the amount of $4,000," is not sufficiently certain to support judgment for plaintiff against the G. Co.[1] But where the caption of a verdict correctly gives the names of all the parties, an error in plaintiff's name in the body of the verdict, by substituting a "t" for an "l," is harmless.[2]

The mere fact that the jury reached a verdict by aggregating 12 different sums and dividing by 12, the quotient corresponding with the verdict, is not sufficient to impeach it;[3] but a preliminary agreement that such a result shall be the verdict will vitiate it when so obtained.[4]

But the affidavit of a juror cannot be received to im-

§ 521. [1] Gulf, C. & S. F. Ry. Co. v. Hathaway, 75 Tex. 557, 12 S. W. 999.

[2] Missouri, K. & T. R. Co. v. Turley (Indian Ter.) 37 S. W. 52. It is proper to have a verdict reduced to proper form; and where a verdict is for plaintiff, for loss of time, $60, actual damage, $290, the trial judge does not err in permitting the jury to correct it by assessing plaintiff's damages at $350, where the foreman of the jury states it to have been their intention to return a verdict for that sum. Houston & T. C. R. Co. v. Hubbard (Tex. Civ. App.) 37 S. W. 25.

[3] St. Clair v. Railway Co., 29 Mo. App. 76.

[4] Illinois Cent. R. Co. v. Able, 59 Ill. 131.

peach the verdict for mistake, or even in respect to the merits, nor prove irregularities or misconduct either on his own part or that of his fellows.[5]

[5] International & G. N. R. Co. v. Gordon, 72 Tex. 44, 11 S. W. 1033; Boyce v. Stage Co., 25 Cal. 460.

CHAPTER XXXVI.

COMPENSATORY DAMAGES.

§ 522. Personal Injuries.
523. Same—Bodily Injury and Pain.
524. Same—Future Injury and Pain.
525. Same—Loss of Time, and Impairment of Earning Capacity.
526. Same—Expense of Cure.
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540. Same—Excessive Force.
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§ 522. PERSONAL INJURIES.

In an action for personal injuries, the elements of damages are:

1. **The bodily injury sustained.**
2. **The pain suffered.**
3. **The effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent.**
4. **The expense incidental to attempts to cure, or to lessen the amount of the injury.**

5. The pecuniary loss sustained through inability to attend to a profession or business, which, again, may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life.[1]

Formerly, courts seem to have been very much at sea as to the elements to be considered in arriving at damages for personal injuries. But "it is now the well-recognized rule of law that the damages recoverable in actions for personal injuries must be limited to compensation for the pain suffered, time lost, and permanent injuries occasioned by the negligence complained of. To these may be added expense, if any, necessarily incurred about being cured." [2] In fixing the damages, the jury ought to take into consideration all the circumstances surrounding the case, including those attending the injury; the loss of time of the plaintiff, if any, occasioned by the injury; the pain he has suffered, if any; the money he has expended, if any, to be cured of such injury; the business he was engaged in, if any, at the time he was injured; and the extent and duration of the injury.[3]

§ 522. [1] Phillips v. Railway Co., 4 Q. B. Div. 406; Goble v. Railroad Co., 10 Fed. Cas. 502.

[2] Jacquin v. Cable Co., 57 Mo. App. 320.

[3] Chicago, R. I. & P. R. Co. v. Otto, 52 Ill. 416. In actions for personal injuries, where the damages to be recovered are merely compensatory, the extent of the injury is an important question, as well as in what respect the party is incapacitated from performing the ordinary duties of life, and what is the pecuniary loss; making due allowance for pain and suffering, and the amount paid for medical and surgical attendance. Chicago, R. I. & P. R. Co. v. Payzant, 87 Ill. 125. In an action for negligent injury to the person of the

Of course, the same rules as to the measure of damages apply, whether the injury is inflicted by a corporation or by a natural person; and it is error to instruct the jury that, as against corporations, they are not confined to the same amount or rules that obtain

plaintiff, he may recover the expenses of his cure, the value of the time lost by him during the cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money. Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714. Compensatory damages for personal injuries include, not only the fair and reasonable expenses of the cure, and the value of time lost, but also reasonable compensation for the bodily pain and suffering attending the injury. Ohio & M. Ry. Co. v. Dickerson, 59 Ind. 317. The sources of damages are: (1) The expenses necessarily and properly incurred by plaintiff in procuring medical aid and attendance, and for nursing, in consequence of the injury, to be assessed and found by the jury from the evidence. (2) If the plaintiff was disabled by the injury from attending to his ordinary business and occupation, compensation for his loss of time so occasioned by the injury, to be assessed by the jury from the evidence. (3) The pain and suffering, physical and mental, to which the plaintiff has been subjected as a consequence of the injury, to be assessed by the jury from the evidence. The damages which the plaintiff would be entitled to recover under this last head are largely in the discretion of the jury, but they should be proportioned as near as can be to the extent of the pain and suffering endured by the plaintiff as a consequence of the injury. They should in no case be excessive in amount, but made judiciously commensurate, in the sound judgment and discretion of the jury, to the pain and suffering, physical and mental, so endured by the plaintiff as a consequence of the injury. Van de Venter v. Railway Co., 26 Fed. 32. Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected by reason of the injuries complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. Goodhart v. Railroad Co. (Pa. Sup.) 35 Atl. 191.

in suits between individuals.[4] But, nevertheless, verdicts against corporations are very apt to be larger than against natural persons. As said by the court of appeals of Kentucky: [5] "When the wife of the neighbor, of the friend, of the countryman, proud of the lovely character pictured by counsel, has been placed in such imminent peril, and suffered so by reason of the neglect of one that has no breath of life, except as imparted by the steam that moves it, human sympathy often controls the judgment, and justice is not measured out by verdicts and judgment, as it would be between neighbor and neighbor, when like neglect results in injury."

In Pennsylvania, at one time a statute existed which limited recoveries for personal injuries to $3,000.[6] But it was held unconstitutional, on the ground that nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods, or person fills the measure secured to him in the declaration of rights.[7]

4 Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.

5 Louisville & N. R. Co. v. Long, 94 Ky. 410, 417, 22 S. W. 747.

6 Act April 4, 1868 (P. L. 58).

7 Thirteenth & F. St. Pass. Ry. v. Boudrow, 92 Pa. St. 475; Central R. of N. J. v. Cook, 1 Wkly. Notes Cas. 319. While this statute was in force the New York court of appeals held that where a person in New York purchases a ticket for transportation between two points in the state, and is injured on a portion of the road in Pennsylvania, the amount of damages recoverable by him is governed by the law of New York, and not by the Pennsylvania statute. Dyke v. Railway Co., 45 N. Y. 113. In Illinois, a statute making railroad companies liable for all expenses of the coroner and his inquest, and the burial of all persons who die on their cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise, was held unconstitutional and void, so far as it attempted to make such

§ 523. SAME—BODILY INJURY AND PAIN.

The nature of the injury is to be considered in awarding damages, and such allowance should be made therefor as, in view of all the attending circumstances, is just and reasonable.[1] The destruction or injury of any function or faculty of the human body is an element of damages, though it may never have been exercised or used. "It is to be assumed that every physical endowment, function, and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to that extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury wrongfully inflicted, whether entailing pain only, or disfigurement or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate in compensation for damages." [2] So disfigurement,[3] especially of a woman,[4] is an element of damages.

companies liable in cases where they have violated no law or have been guilty of no negligence. Ohio & M. Ry. Co. v. Lackey, 78 Ill. 55.

§ 523. [1] Baker v. Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979.

[2] Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722. In this case it was held that the fact that childbearing is rendered perilous to the life of a young unmarried woman by reason of injuries sustained in a railroad accident may be taken into consideration by the jury, though she might never have married or desired to bear children.

[3] Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, and 31 S. W. 147.

[4] The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572. "In this coun-

Bodily pain and suffering is also an element of damages.[5] "The law guaranties to every person the right of personal security, which includes the uninterrupted enjoyment of his life and limbs, of his health and reputation; and he who, by a willful or a culpably negligent act, deprives him of these blessings, or interferes with the full enjoyment of them, subjects himself, in addition to such public punishment as the law has provided, to the liability of making compensation in dam-

try, at least, it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance—comeliness—is a consideration of comparative importance in the case of every daughter of Eve." Id.

[5] Ransom v. Railroad Co., 15 N. Y. 415; Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Ball v. Mabry, 91 Ga. 781, 18 S. E. 64; Western & A. R. Co. v. Drysdale, 51 Ga. 644; Indianapolis, B. & W. Ry. Co. v. Beaver, 41 Ind. 493; Pennsylvania R. Co. v. Allen, 53 Pa. St. 276. The bodily pain and suffering is part and parcel of the actual injury, for which the injured party is as much entitled to compensation in damages as for loss of time or the outlay of money. It is true, the footing for a precise and accurate estimate of damages may not be quite as sure and fixed in regard to it as where loss has been sustained in time or money, and yet the actual damage is no less substantial and real. Morse v. Railroad Co., 10 Barb. (N. Y.) 621. Compensatory damages recoverable for personal injuries are not limited to those injuries which impair or destroy the ability of the person injured to earn money for his own support or for the support of his family; but, in estimating such damages, pain and suffering, shattering of the nervous system, permanent physical injuries reducing one to the condition of a hopeless invalid, incapacitated to enjoy the pleasures of life, whether the person injured was a wage earner or not, are proper elements to be considered by the jury in assessing damages, and by the court in entering judgment on the verdict. Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181.

ages to the aggrieved party." [6] In an action for personal injuries necessitating the amputation of an arm, it is competent for plaintiff to show that after the am-

[6] Denio, C. J., in Ransom v. Railroad Co., 15 N. Y. 415. As to the amount of damages recoverable for pain and suffering, the supreme court of Pennsylvania has recently said: "Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff, in addition to other items of damage to which he is entitled, in consideration of suffering necessarily so endured. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner. * * * By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be, what is it reasonable to add to the value of the lost time, in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper, but, in answer to the question, how much? the only reply yet made is that it must be reasonable in amount. Pain cannot be measured in money. It is a circumstance, however, that may be taken into account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word 'compensation,' in the phrase 'compensation for pain and suffering,' is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury." Goodhart v. Railroad Co. (Pa. Sup.) 35 Atl. 191.

putation he experienced pain, seemingly in the amputated member. Such bodily pain, though deceptive, is properly an element of damage.[7]

§ 524. SAME—FUTURE INJURY AND PAIN.

In estimating damages for personal injuries, the jury is not limited to past injury and suffering. They may take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future injury or suffering will ensue.[1] The reason is that successive actions cannot be brought by plaintiff for the recovery of damages as they may accrue from time to time, resulting from an injury to the person, as would be the case for a continuous wrong or a continuous trespass.[2] So, though an injury is not of a permanent character, yet plaintiff is entitled to recover for such future pain and suffering as it is reasonably certain from the evidence that he will suffer.[3]

But, in all cases, to entitle such apprehended conse-

7 Hickenbottom v. Railroad Co., 122 N. Y. 91, 25 N. E. 279.

§ 524. 1 Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264, 277, 3 N. E. 836; Bay Shore R. Co. v. Harris, 67 Ala. 6; Holyoke v. Railway, 48 N. H. 541; Curtis v. Railroad Co., 18 N. Y. 534, affirming 20 Barb. (N. Y.) 282; Johnson v. Railroad Co., 47 Minn. 430, 50 N. W. 473.

2 Filer v. Railroad Co., 49 N. Y. 42.

3 Fry v. Railway Co., 45 Iowa, 416; Union Pac. Ry. Co. v. Jones, 1 C. C. A. 282, 49 Fed. 343. Where an injury is permanent, and of such a nature as to complicate other diseases, should plaintiff be affected therewith in the future, plaintiff's liability to suffer more from other illnesses is an element of damage. Crank v. Railway Co., 53 Hun, 425, 6 N. Y. Supp. 229, affirmed 127 N. Y. 648, 27 N. E. 856.

quences to be considered by the jury, they must be such as, in the ordinary course of nature, are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to develop. To entitle plaintiff to recover damages for future apprehended injuries, there must be such a degree of probability of their occurring as amount to a reasonable certainty that they will result from the original injury.[4] But evidence that plaintiff's injury produced an incurable spinal disease, and that during the whole time from the accident to the trial—19 months—

[4] Strohm v. Railroad Co., 96 N. Y. 305, reversing 32 Hun (N. Y.) 20; Meeteer v. Railway Co., 63 Hun, 533, 18 N. Y. Supp. 561; Johnson v. Railway Co., 52 Hun, 111, 4 N. Y. Supp. 848; Reichman v. Railroad Co., 48 Hun, 620, 1 N. Y. Supp. 836; Bateman v. Railroad Co., 47 Hun (N. Y.) 429; Matteson v. Railroad Co., 62 Barb. (N. Y.) 364; Hardy v. Railway Co., 89 Wis. 183, 61 N. W. 771; White v. Railway Co., 61 Wis. 536, 21 N. W. 524. Future suffering which plaintiff will in reasonable probability endure is an element of damages, and is equivalent to such consequences as are reasonably certain to ensue from the injury. Hamilton v. Railroad Co., 17 Mont. 334, 43 Pac. 713. In an action for a permanent personal injury, the actual effects down to the time of trial are provable, and whether those that may ensue may be taken into account will depend on whether they are imminent and sufficiently certain. Chicago City Ry. Co. v. Yancey, 33 Ill. App. 94. Mere possibility of future pain is not sufficient as a basis for damages, but an instruction to award damages for the pain and anguish the jury "may believe from the evidence plaintiff will suffer in the future" is not objectionable. Bigelow v. Railway Co., 48 Mo. App. 367. See, also, ante, § 469.

his suffering has been continuous, is sufficient to warrant the jury in allowing damages for future pain.[5]

§ 525. SAME—LOSS OF TIME, AND IMPAIRMENT OF EARNING CAPACITY.

In an action for personal injuries, the pecuniary loss which plaintiff has sustained through his consequent disability to follow his usual calling or occupation is an element of damage.[1] To this end he may show the nature of his employment or occupation, and the amount of his salary or earnings.[2]

In addition to this, the reduction which the accident has wrought in plaintiff's earning powers, whether physical or mental, or both combined, is to be considered; and, in order to do this properly, reference must always be had to the business in which he was engaged at the time of the accident.[3] In estimating these damages, it is proper to take into consideration plaintiff's habits of industry, occupation, opportunities for employment, health, and prospects of life; and to be governed by ordinary human knowledge and experience as to the age at which plaintiff would likely have

[5] Weiler v. Railway Co., 53 Hun, 372, 6 N. Y. Supp. 320, affirmed 127 N. Y. 669, 28 N. E. 255.

§ 525. [1] Phillips v. Railway Co., 5 C. P. Div. 280; Hayes v. Railroad Co., 15 Mo. App. 583.

[2] Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297.

[3] Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; St. Louis S. W. Ry. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, and 31 S. W. 147; Houston & T. C. Ry. Co. v. Boehm, 57 Tex. 152.

remained capable of labor, as shown by the evidence.[4] So the kind and amount of physical labor plaintiff was accustomed to perform before the accident may be compared by the jury with that which he has been able to do since, in determining what compensation he should receive for his loss of physical and mental capacity.[5] So where a personal injury has prevented plaintiff from pursuing his occupation of selling goods on commission, evidence as to the amount of his commissions for several years prior to the injury is competent on the question of damages.[6]

The true measure of damages for permanent injuries incapacitating plaintiff from following his usual avocation is not such sum as will bring an annual interest corresponding with the annual value of his labor, leaving the principal sum still belonging to plaintiff's estate after his death, but is an amount which will purchase an annuity equal to this interest, during the probable life of the plaintiff, calculated upon a reliable

[4] Louisville, N. A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343. But inquiry as to plaintiff's accumulated earnings is immaterial. Wallace v. Railroad Co., 104 N. C. 442, 10 S. E. 552.

[5] Ballou v. Farnum, 11 Allen (Mass.) 73. Where a boarding-house keeper is injured by the negligent act of a carrier, evidence that by reason of the injuries she has been unable to carry on her business is admissible. Such evidence is not an effort to show loss of profits, but loss of earning power in her business and occupation. Malone v. Railroad, 152 Pa. St. 390, 25 Atl. 638. Evidence as to what plaintiff's business (a contractor for painting of buildings) was worth for the year preceding the injury, and what it was afterwards, is competent to show how much his earning capacity has been decreased by reason of the injury. Chicago & E. R. Co. v. Meech, 59 Ill. App. 69.

[6] Illinois Cent. R. Co. v. Davidson, 22 C. C. A. 306, 76 Fed. 517.

basis of the average duration of human life.[7] In order to assist the jury in making such estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence.[8] But the rules to be derived from such tables or computations are not the absolute guides of the judgment and consciences of the jury. On the contrary, the jury should award a fair and reasonable compensation, taking into consideration what plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it would have been liable.[9]

[7] Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714; Houston & T. C. R. Co. v. Willie, 53 Tex. 318.

[8] Galveston, H. & S. A. Ry. Co. v. Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990. See, also, ante, § 464.

[9] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 554, 7 Sup. Ct. 1. In Richmond & D. R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352, it was said on this subject: "No fixed rule exists for estimating the amount of damages from permanent injuries to the person, because it is impossible to prove such exact data as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived if he had not been injured. It is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness, or the loss of an opportunity to labor. It is impossible to say whether he would have continued to earn the same amount of money during his whole life, whether he would have earned more, and how much more, or less, and how much less; whether he would have remained in the same occupation, or would have abandoned that and pursued another more lucrative, or less so. Unless these and other facts which might be enumerated could be shown to the jury, we do not see how a fixed rule to measure the damages for a permanent injury could be prescribed to the jury. It may be said, however, that the life tables put in evidence would show a man's expectancy of life, and that the

But while it is proper to prove the age, health, habits, occupation, expectation of life, ability to labor, and the probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, it is improper to allow proof of a particular possibility, or even probability, of any increase in wages by appointment to a higher public office, especially where the appointment is somewhat controlled by political reasons.[10] So earnings

amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair either to the plaintiff or to the railroad company. If the plaintiff were a young man of character, capacity, and industry, and had chosen his occupation and commenced its pursuit, his yearly income at first might be small, but in a few years he might be able to increase it very largely; yet, under the rule contended for, he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery, because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability, and indisposition to labor come upon him more and more each year as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule. * * * We therefore think it is better for both parties to let the jury look at these things as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict as would be reasonable and just to both parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured, and thereby prevented, by the negligence of defendant."

[10] Richmond & D. R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352. But in

which result in part from the use of plaintiff's capital cannot be considered in estimating damages for a personal injury. It is only in cases where the earnings proceed entirely from plaintiff's labor that the impairment of earning capacity can be considered.[11] Nor can the profits of a business of which plaintiff was manager be shown as a measure of his earning powers before the injury. Profits derived from an investment or the management of a business enterprise are not earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business.[12]

The party seeking to recover damages for loss of time should be required to establish his claim by competent evidence.[13] Nominal damages only can be recovered for loss of salary where the evidence, though it shows the fact of such loss, does not show the amount thereof in dollars and cents.[14] This rule applies to future loss as well as past loss. Before damages for fu-

Iowa it has been held that, in an action for permanent personal injuries which prevented plaintiff from performing her work as a stenographer, it was proper to show, as bearing on the question of damages, that under her contract of employment she was to receive an increase of salary in a short time if her work proved satisfactory. Bryant v. Bridge Co. (Iowa) 67 N. W. 392.

[11] Johnson v. Railway Co., 52 Hun, 111, 4 N. Y. Supp. 848.

[12] Goodhart v. Railroad Co. (Pa. Sup.) 35 Atl. 191.

[13] Winter v. Railway Co., 74 Iowa, 448, 38 N. W. 154.

[14] Baker v. Railroad Co., 118 N. Y. 533, 23 N. E. 885; affirming 54

ture pecuniary loss can be awarded, there should be some proof, such as a party can always give, of his circumstances and conditions in life, his earning powers, skill, and capacity.[15] But in Texas it is not indispensable that there be positive evidence as to plaintiff's age, and the probable duration of life, in assessing damages for decreased working capacity, where plaintiff testifies in person before the jury, and is subject to their examination, and there are facts in evidence indicating his age.[16]

§ 526. SAME—EXPENSE OF CURE.

The expense of cure or of an attempted cure is a proper element of damage. One who has incurred a liability for medical services required by reason of an injury to him may recover the amount, whether he has paid it or not.[1] The expense of a trip and nurse hire

N. Y. Super. Ct. 394; Klein v. Railroad Co., 54 N. Y. Super. Ct. 164; International & G. N. Ry. Co. v. Simcock, 81 Tex. 503, 17 S. W. 47.

[15] Staal v. Railroad Co., 107 N. Y. 625, 13 N. E. 624, reversing 36 Hun (N. Y.) 208.

[16] Gainesville, H. & W. Ry. Co. v. Lacy, 86 Tex. 244, 24 S. W. 269. While, in an action for personal injuries, the absence of evidence of the value of plaintiff's earnings precludes a recovery of substantial damages for loss thereof, he is nevertheless entitled to nominal damages on that account; and, to make an objection to a recovery of more than nominal damages for such loss available to defendant, a specific request that only nominal damages can be recovered for loss of wages is necessary. Seitz v. Railroad Co. (Com. Pl.) 10 N. Y. Supp. 1.

§ 526. [1] Atchison, T. & S. F. Ry. Co. v. Click (Tex. Civ. App.) 32 S. W. 226; San Antonio St. Ry. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; Klein v. Thompson, 19 Ohio St. 571. But in Illinois it has been held that plaintiff must prove that he paid the physician's

reasonably incurred in an attempt to be cured of the injuries is likewise recoverable.[2] But plaintiff cannot recover for medical services an amount in excess of their reasonable value, though his physician is employed as an expert witness in the case.[3]

It need not affirmatively appear that plaintiff's physician is a duly-licensed practitioner to authorize a recovery for his services, but the fact that he is, and for a long time has been, practicing as a physician and surgeon is sufficient to show prima facie that he is lawfully authorized to do so.[4] But defendant should be permitted to prove the fact that plaintiff's physician has not been licensed, since, in such a case, no liability for medical services would be incurred.[5]

Some courts hold that the fact that attendants on an injured person rendered their services gratuitously does not bar a recovery for their reasonable value, when such services were necessary to ameliorate his condition and suffering. That they were voluntarily and gratuitously rendered was for his benefit, and not for the benefit of defendant.[6] But the supreme court of Pennsylvania has recently held that in an action for personal injuries plaintiff cannot recover the value of

bill, that he necessarily incurred it, and that it was reasonable. North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899.

[2] Sherwood v. Railway Co., 82 Mich. 374, 46 N. W. 773.

[3] Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19.

[4] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 499, 29 N. E. 899.

[5] San Antonio St. Ry. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

[6] Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Klein v. Thompson, 19 Ohio St. 569; The D. S. Gregory, 2 Ben. 226, Fed. Cas. No. 4,100; Cunningham v. Railroad Co., 102 Ind. 478, 1 N. E. 800.

services of members of his family in nursing him, in the absence of an express agreement on his part to pay therefor. The court said: "The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with the same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues." [7] But to authorize a recovery for medicines and medical treatment, it is not sufficient to show that they were reasonably and necessarily employed, but there must be evidence as to their value.[8] Where damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to the guess of the jury even in actions ex delicto.[9]

[7] Goodhart v. Railroad Co. (Pa. Sup.) 35 Atl. 191. See, also, Chicago, B. & Q. R. Co. v. Johnson, 24 Ill. App. 468. Attorney's fees are not recoverable in an action for personal injuries. Atchison, T. & S. F. R. Co. v. Stewart, 55 Kan. 667, 41 Pac. 961.

[8] Eckerd v. Railway Co., 70 Iowa, 353, 30 N. W. 615; Reed v. Railroad Co., 57 Iowa, 23, 10 N. W. 285; Smith v. Railroad Co., 108 Mo. 244, 18 S. W. 971; Culberson v. Railway Co., 50 Mo. App. 556; Madden v. Railway Co., Id. 666; North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Cousins v. Railway Co., 96 Mich. 386, 56 N. W. 14.

[9] Duke v. Railway Co., 99 Mo. 347, 12 S. W. 636. For breaking an

§ 527. SAME—MARRIED WOMEN.

The measure of damages for injuries to the person of a married woman differs in no respect from that applicable to other persons, so far as bodily injury and pain are concerned. Where the injury produces a miscarriage, the prospective earnings of the child and the loss of its society are not proper elements of damage; but the jury may take into account the mother's physical and mental pain consequent on the miscarriage.[1]

At common law, however, the wife's services and society belonged to the husband, and he alone could sue for their loss. Hence they could not be included as elements of damage in an action by husband and wife jointly for her injuries.[2] This principle still obtains in most of the states, notwithstanding the married women's statutes. A married woman engaged in the ordinary duties of a housewife, and not in any independent employment, cannot recover for loss of time occasioned by a personal injury, the right of action therefor belonging to her husband.[3] But under a statute which provides that all rights of action which may be

artificial limb the passenger can recover only its value, and evidence that he paid $200 for a new one is not sufficient to permit the recovery of any sum for the old one. North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899.

§ 527. [1] Tunnicliffe v. Railway Co., 102 Mich. 624, 61 N. W. 11; Hawkins v. Railway Co., 3 Wash. St. 592, 28 Pac. 1021.

[2] Dengate v. Gardiner, 4 Mees. & W. 6; Stroop v. Swarts, 12 Serg. & R. (Pa.) 76; Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74.

[3] Tuttle v. Railroad Co., 42 Iowa, 518; Nichols v. Railway Co., 68 Iowa, 732, 28 N. W. 44; Tunnicliffe v. Railway Co., 102 Mich. 624, 61 N. W. 11.

due to a married woman "as the wages of her separate labor, or have grown out of the violation of her personal rights, * * * shall be and remain her separate property, and under her sole control," a married woman suing for personal injuries may recover for loss of wages during the time of her disability.[4]

On the question whether a married woman can recover damages for her diminished earning capacity, the authorities are not uniform. In New York the rule is: "Presumptively, damages for negligence diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages the complaint must contain an allegation that for some reason she is entitled to the fruits of her labor; or if she seeks to recover damages for an injury to her business she must allege that she was engaged in business on her own account, and by reason of the injury was injured therein as specifically set forth. In the absence of such an allegation, a married woman cannot recover for loss of earnings or injury to business by reason of her personal injuries." [5] But in other states the rule is the other way, and a married woman may recover damages for her decreased earning capacity.[6]

A married woman, it is generally held, is not entitled

[4] Smith v. Railroad Co., 119 Mo. 246, 23 S. W. 784. But in Bigelow v. Railway Co., 48 Mo. App. 367, this statute was apparently overlooked, and it was held that a married woman could not recover for loss of services.

[5] Uransky v. Railroad Co., 118 N. Y. 304, 23 N. E. 451, reversing 44 Hun (N. Y.) 119. See, also, Filer v. Railroad Co., 49 N. Y. 47.

[6] Hamilton v. Railway Co., 17 Mont. 354, 43 Pac. 713; Jordan v. Railroad Co., 138 Mass. 425; 2 Sedg. Meas. Dam. § 486.

to recover expenses incurred in medical treatment for personal injuries, as her husband, and not she, is liable for their payment.[7] But in Michigan it has been held that she may recover for medical expenses, where sole credit was given to her on account thereof, though they have not been paid at the time of trial.[8]

In states where the community system obtains, the last vestiges of the common-law rules on this subject have been swept away. The supreme court of Texas has recently said: "The term 'service,' as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member of the matrimonial partnership in Texas. She no more owes service to the husband than he to her. Her duties are those of a wife, and are not to be valued as those of a servant or hireling. The fruits of her labor belong to the community, as do those of the husband; and the same rules that apply to the one under like circumstances apply to the other. The husband usually follows a pursuit which makes a return in money, and the value of his labor can be ascertained by a comparison with that of other men in like employment and with like ability. The wife's labor, while equally valuable to the community, does not command a price in the market, and therefore cannot be proved by experts, as can that of the husband. If she were to engage to work for hire, or in an independent business for gain, the same rule would ap-

[7] Belyea v. Railway Co., 61 Minn. 224, 63 N. W. 627; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453.

[8] Lucas v. Railway Co., 92 Mich. 412, 52 N. W. 745.

ply as to a man." [9] So the supreme court of Washington has held that a right of action for personal injuries to the wife is community property; and in such action the husband, as the head of the community, is the only necessary party, though the wife is a proper party; and in such an action all of the damages naturally flowing from the injury are recoverable. "The first element of these to be considered is that directly connected with the person of the wife,—the injury, and its subsequent consequences, whether permanent or temporary, and her pain, suffering, and wounded feelings, etc.; next, the cost of her nursing, medical attendance, and medicine, which, although they could at common law be recovered by the husband alone, are with us presumptively expenses incurred and paid by the community; and, lastly, the loss of the wife's services in the household." [10]

§ 528. SAME—RECOVERY BY HUSBAND FOR INJURIES TO WIFE.

In an action by a husband for injuries to his wife, the measure of damages is: (1) The value of the loss of services and companionship of his wife, to the extent that such injuries have incapacitated her from performing all the duties of a wife that reasonably devolve

[9] Gainesville, H. & W. Ry. Co. v. Lacy, 86 Tex. 244, 24 S. W. 269. In this case it was held that a jury is at liberty to assess damages for diminished earning capacity where it appears that by reason of the accident she was rendered incapable of performing her household duties, which she had theretofore done, though there is no evidence of the value of her labor either before or after the injury.

[10] Hawkins v. Railway Co., 3 Wash. 592, 28 Pac. 1021.

on her in the marriage relation. (2) For money laid out and expended in employing physicians, and for medicines to cure her of such injuries. (3) The expenses of nursing.[1] These rules apply, whether the wife was negligently or willfully injured.[2] The husband is entitled to his wife's society as she was at the time when defendant's negligence impaired her health, strength, and usefulness as a helpmeet; and any diminution of her capacity for usefulness, aid, and comfort as a wife constitutes a basis for compensation for damages.[3] If the wife's condition at the time of the trial is such as to disable her for the future, and require further expenses for medical and surgical treatment, the jury may give damages for prospective damages and loss of services.[4] The husband may recover for the loss of his own time while attending and nursing his wife injured by defendant's negligence.[5] Nor is it a defense to an action for loss of a wife's services through personal injuries that plaintiff has not lived with her since the accident, where the cause of the separation

§ 528. [1] Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Mewhirter v. Hatten, 42 Iowa, 288; Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891.

[2] Sloan v. Railroad Co., 1 Hun (N. Y.) 540; Ainley v. Railroad Co., 47 Hun (N. Y.) 206.

[3] Furnish v. Railway Co., 102 Mo. 669, 15 S. W. 315.

[4] Hopkins v. Railroad, 36 N. H. 9.

[5] Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S. W. 993; Blair v. Railroad Co., 89 Mo. 334, 1 S. W. 367. In an action by a husband for personal injuries to his wife, plaintiff may recover damages both for the time lost by himself in attending upon his wife and also for the time lost by her in attending on her injuries. Ft. Worth & D. C. Ry. Co. v. Kennedy (Tex. Civ. App.) 35 S. W. 335.

was that, plaintiff being unable to support her in her enfeebled condition, she went to her mother's house.[6] Since the value of a wife's society is not subject of direct proof, the jury may assess reasonable compensation for its loss, without evidence on the subject.[7]

§ 529. SAME—RECOVERY BY PARENT FOR INJURIES TO CHILD.

When a minor child has been injured through the wrongful act or negligence of another, the father is entitled to recover as damages an amount which will fully compensate him for loss of services and care of the child, and the expense resulting from the injury, for a period not extending beyond the majority of the child, including surgical attention, care, nursing, medicine, and the like.[1] But the jury cannot, in such a case, take into view the shock to parental feelings in consequence of the injury to the child.[2]

By some authorities, the loss of service has been regarded as the foundation of the action; and the English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where the child is of such tender years as to be incapable of rendering any services. The authorities in this country approve a more liberal and more reasonable doctrine, and, basing

[6] Bowdle v. Railway Co., 103 Mich. 272, 61 N. W. 529.

[7] Furnish v. Railway Co., 102 Mo. 669, 15 S. W. 315.

§ 529. [1] Buck v. Power Co., 46 Mo. App. 555; Frick v. Railway Co., 75 Mo. 542; Smith v. City of St. Joseph, 55 Mo. 456; Dunn v. Railway Co., 21 Mo. App. 188.

[2] Black v. Railroad Co., 10 La. Ann. 33.

the right of action upon the parental relation, instead of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor.[3] It has even been held that the fact that a daughter has attained her majority does not prevent her father from recovering the cost of medical attendance and other necessary expenses incurred by him to cure her of her injuries caused by defendant's negligence.[4]

§ 530. SAME—MITIGATION OF DAMAGES.

In estimating the pain and suffering arising from personal injuries, plaintiff's bad character cannot be considered in mitigation of damages.[1] But on the question of damages for decreased earning capacity, plaintiff's character and habits are material. Where plaintiff puts in evidence that he is a mechanic, and that before the accident he was industrious, and able to earn good wages, and that the injury crippled him, and

[3] Netherland-American Steam Nav. Co. v. Hollander, 8 C. C. A. 169, 59 Fed. 417; Cuming v. Railroad Co., 109 N. Y. 95, 16 N. E. 65; Dennis v. Clark, 2 Cush. (Mass.) 347; Clark v. Bayer, 32 Ohio St. 300; Durden v. Barnett, 7 Ala. 169; Sykes v. Lawlor, 49 Cal. 236.

[4] Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891.

§ 530. [1] Johnson v. Wells, Fargo & Co., 6 Nev. 224; Bruce v. Priest, 5 Allen (Mass.) 100; Corning v. Corning, 6 N. Y. 97. But in Abbot v. Tolliver, 71 Wis. 64, 36 N. W. 622, it was said that the fact that plaintiff was an unchaste woman might be considered by the jury in awarding damages, though her pain and suffering would be as great as that of a virtuous woman in like circumstances. In view of the fact that the principal injury in this case was laceration and displacement of plaintiff's womb, why should not the fact that she was a woman of easy virtue be taken into consideration on the question of diminished earning capacity, if the question of her character is to be considered at all?

incapacitated him from labor, defendant may show that both before and after the accident plaintiff was an habitual drunkard, and that his habits of drunkenness had incapacitated him from labor.[2]

The fact that plaintiff has an independent fortune cannot be taken into consideration in estimating his pecuniary loss caused by his inability to continue his usual calling or avocation.[3] Nor is it any ground for mitigating damages that plaintiff's salary was continued by his employers while he was disabled by the injury,[4] or that he received a sum of money on an accident insurance policy.[5]

The pendency of other suits against a railroad company for damages growing out of the accident in suit cannot be considered by the jury in assessing plaintiff's damages.[6]

§ 531. MENTAL SUFFERING AND FRIGHT.

Where physical injuries are inflicted, either willfully or negligently, mental suffering caused thereby is a

[2] Cleveland & P. R. Co. v. Sutherland, 19 Ohio St. 151. But evidence of plaintiff's drinking habits is not admissible in mitigation of damages when there is no issue as to his capacity to earn a living prior to the accident. Union Pac. Ry. Co. v. Reese, 5 C. C. A. 510, 56 Fed. 288.

[3] Phillips v. Railway, 5 C. P. Div. 280.

[4] Williams v. Railway Co., 123 Mo. 573, 27 S. W. 387; Ohio & M. Ry. Co. v. Dickerson, 59 Ind. 317; Missouri Pac. Ry. Co. v. Jarrard, 65 Tex. 560. Contra, Ephland v. Railway Co., 57 Mo. App. 147.

[5] Pittsburg, C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138.

[6] Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57.

proper element of damages.[1] Mental suffering cannot be dissociated from physical pain. Where the latter is found, the former will be implied. The law furnishes, and in the nature of things can furnish, no standard by which to measure and compensate either in money. The question of compensation must be submitted to the jury, who, in the exercise of a sound discretion, guided by their views of the evidence, are to return a verdict for such sum as they may deem just, not in excess of the amount sued for. If the discretion is abused, and the verdict excessive, it may be set aside by the court.[2] So, loss of mental power, as the result of a personal injury, is a proper element of damages to be considered by the jury.[3] But the jury cannot award damages separately for "mental agony" and for "peril and fright," since this would be giving double damages to plaintiff for mental anguish.[4]

§ 531. [1] Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Matteson v. Railway Co., 62 Barb. (N. Y.) 364.

[2] Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363. See, also, Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696. But it has been held that plaintiff cannot recover for "pain of mind," as distinct from bodily injuries. Johnson v. Wells, Fargo & Co., 6 Nev. 224.

[3] Toledo, W. & W. Ry. Co. v. Baddeley, 54 Ill. 19.

[4] San Antonio & A. P. Ry. Co. v. Corley, 87 Tex. 432, 29 S. W. 231. So, in an action for personal injuries to a married woman, producing a miscarriage, it is better for the court not to charge that pain and suffering or sorrow are elements of damage. Pain and suffering give a sufficiently wide latitude to juries, and the word "sorrow" had better be omitted. Augusta & S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706. In an action for personal injuries caused by the derailment of a train, it is error to charge, in the language of Code Ga. § 3067, that in some torts the entire injury is to the peace, happiness, and feelings of the plaintiff, and that in such cases no measure of

But in cases where no physical injury is sustained, and there are no circumstances of insult and abuse, the decided weight of authority is that damages for mental suffering cannot be recovered. Thus, where the engineer of a train does not observe a signal, the failure to stop the train, and take on a passenger, will not authorize a recovery for mental suffering.[5] So damages cannot be recovered for anxiety and suspense of mind in consequence of a carrier's failure to transport a passenger to destination with reasonable promptness.[6] So, in an action for carrying a passenger past his destination, mental suffering arising from the passenger's separation from his family is not an element of damages, unless willfulness or other conduct on the part of the company or its agents tending to aggravate the wrong be shown.[7] So mere fright, unaccompanied by physical ailment, is no ground for the assessment of damages.[8]

In Texas, however, where an extremely liberal rule in respect to damages for mental suffering prevails, it has been held that an inexperienced girl, unaccustomed to travel, who is put off a train at a station short of her destination, where she is an entire stranger, is entitled

damages can be prescribed except the enlightened conscience of impartial jurors. That section applies only when there is no physical injury. Central R. v. Senn, 73 Ga. 705.

[5] Illinois Cent. R. Co. v. Siddons, 53 Ill. App. 607. In Illinois Cent. R. Co. v. Sutton, 53 Ill. 397, it was said that damages for mental suffering alone cannot be recovered where defendant did not act willfully.

[6] Turner v. Railway Co., 16 Wash. 213, 46 Pac. 243.

[7] Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36.

[8] Judice v. Southern Pac. Co., 47 La. Ann. 255, 16 South. 816.

to recover for mental suffering caused by feelings of insecurity or danger, though there was no aggravation attending her leaving the train, nor in the action of the conductor.[9] But even in Texas it is held that a passenger who is expelled from a train on which he has taken passage in order to reach a sick child as soon as possible cannot recover for mental anguish suffered on account of the child.[10] Nor is mental anguish suffered by a passenger in borrowing money to pay fare and to avoid a wrongful ejection from a train an element of damages. Litigation would become intolerable if the embarrassment attending the borrowing of money in this country should become actionable.[11] So, in an action for carrying plaintiff past her destination in the dark, and compelling her, with a six year old nephew, to leave the train some distance beyond, damages for mental suffering of plaintiff cannot include that which she suffered out of sympathy because of the fright and distress of the child.[12]

[9] Missouri Pac. Ry. Co. v. Kaiser, 82 Tex. 144, 18 S. W. 305.

[10] Gulf, C. & S. F. Ry. Co. v. Hurley, 74 Tex. 593, 12 S. W. 226. For the wrongful ejection of a passenger, he may recover for such mental suffering or feeling of humiliation as attended the ejection as a direct result therefrom, but he cannot recover for mental distress caused by an apprehension that his delay might cause him to be discharged from his employer's service, or by fear that he could not reach his destination in time to make a remittance to his principal according to the usual custom of business. Pullman Palace-Car Co. v. McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945.

[11] Missouri, K. & T. Ry. Co. v. Armstrong (Tex. Civ. App.) 38 S. W. 368.

[12] Pullman Palace-Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96. In an action by a husband for injuries to his wife, pain and mental anguish suffered by the husband on account thereof cannot

Where a wrongful act is accompanied by insult, abuse, or oppression, the decided weight of authority is that compensatory damages for mental suffering may be recovered, though there has been no physical injury. Thus, where a passenger was subjected to a series of systematic indignities by the captain of a vessel, Mr. Justice Story awarded damages for mental suffering, though no blow was struck, nor any actual physical injury inflicted.[13] Damages for mental suffering may be recovered by a passenger who was insulted and abused at a station in the hearing of the station agent, without interference on his part, though she received no physical injuries.[14] This principle is frequently applied in

be considered as an element of damage. Missouri Pac. Ry. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066, and 21 S. W. 781.

[13] Chamberlain v. Chandler (1823) 3 Mason, 242, Fed. Cas. No. 2,575. In this case it was said: "It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks upon them as unworthy of its cognizance. The master is at liberty to inflict the most serious mental sufferings, in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the range of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by the acts of wanton injustice equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated, and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense."

[14] Texas & P. Ry. Co. v. Jones (Tex. Civ. App.) 39 S. W. 124. As

actions for the expulsion of passengers from trains.[15] So, in an action for assault committed by a conductor on a passenger, compensatory damages may be recovered against the company for mental anguish caused by the manner in which the assault was committed, or for the outrage and the indignity, in addition to the mental anguish caused by the injury itself.[16]

Where the action is in form for breach of contract, damage for mental suffering is not, as a rule, recoverable. Thus, in an action on contract, for failure of a railway company to start a special Sunday excursion train at 5:30 p. m. on its return trip, and compelling the passenger to wait until 1:30 a. m., no damages can be recovered for annoyance and vexation of mind, and for mental distress and sense of wrong, though defend-

to carrier's liability for insult and abuse of passenger by fellow passengers, see ante, § 100. Where a passenger is wrongfully denied admission to an elevated train after he has deposited his ticket in the box, and where he is charged by implication with an attempt to steal a ride, mental suffering, indignity, and insult are elements of damages. Cagney v. Railway Co. (City Ct. N. Y.) 2 N. Y. Supp. 410.

[15] See post, § 538.

[16] McKinley v. Railroad Co., 44 Iowa, 314. In an action for assault the compensatory damages which may be recovered of the principal for the agent's act include, not merely the plaintiff's pecuniary loss, but also compensation for mental suffering. And no distinction is to be made between other forms of mental suffering and that which consists in a "sense of wrong or insult" arising from an act really or apparently dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult. Craker v. Railway Co., 36 Wis. 657. Where wantonness or mischief on the part of an agent acting within the scope of his authority causes additional injury, in body or mind, the principal is liable to make compensation for the whole injury suffered. Lucas v. Railroad Co., 98 Mich. 1, 56 N. W. 1039.

ant's conduct was willful and oppressive.[17] So, in an action against a railroad company for breach of contract in refusing to furnish a special train, damages cannot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent, though the company may have been fully informed of the peculiar circumstances influencing plaintiff to make the contract.[18]

§ 532. SAME — ILLNESS OR INSANITY CAUSED BY FRIGHT OR SHOCK.

On the question whether damages are recoverable for an illness caused by fright or nervous shock, not accompanied by physical injury, the authorities are irreconcilably in conflict. In England, it has been held by high authority that no such damages are recoverable.[1] So the New York court of appeals has quite recently laid down the rule that no recovery can be had

17 Walsh v. Railway Co., 42 Wis. 23.

18 Wilcox v. Railroad Co., 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264. A passenger whose sufferings from rheumatism are aggravated by the wrongful refusal of the porter of a sleeping car to take down his berth, and who is thereby compelled to ride in a sitting instead of a reclining position, cannot recover for mental pain or suffering, as distinguished from physical suffering, in the absence of any harsh or unkind treatment. Pullman Palace-Car Co. v. Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268. But in Morrison v. The John L. Stephens, Hoff. Op. 473, Fed. Cas. No. 9,847, it was held that, for breach of a contract for the exclusive use of a stateroom by a passenger and his invalid wife, the disappointment and irritation of the husband and the discomfort and suffering of the wife, resulting from assigning them to separate staterooms, are elements of damages.

§ 532. 1 Victorian Rys. Com'rs v. Coultas, 13 App. Cas. 222.

for mere fright where no immediate personal injury is received; nor, in such a case, can there be any recovery for the consequences of fright,—as a miscarriage. The court said: "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they are caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims."[2] So far has this princi-

[2] Mitchell v. Railway Co. (N. Y. App.) 45 N. E. 354, reversing 4 Misc. Rep. 575, 25 N. Y. Supp. 747. In this case, while a female passenger was about to board a street car, the driver of another car drove his horses upon her in such a manner that their heads were on either side of her. The fright and excitement rendered her unconscious, and as a result of the mental shock she had a miscarriage, and was ill for a long time. The court of appeals further held that the miscarriage was not the proximate result of the negligent driving. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may therefore be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. As to the question of proximate cause, see ante, c. 9. Mental anguish, distress of mind, or fright caused by carrying a 14 year old girl a mile and a quarter past her destination, and compelling her to walk back over several railroad bridges, and through a deep cut, in fear of meeting tramps, is not an element of damages; nor is the effect of such

ple been carried that it has been held by one of the federal circuit courts of appeals that a railroad company is not liable for the insanity of a passenger, produced, not by any personal injury, but by the excitement, hardship, and suffering caused by the wreck of the train in which he was riding, together with a pre-existing disease,—la grippe. "If the disease of insanity was not likely to result from the accident, and was not one which defendant could reasonably have foreseen, in the light of the attending circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Haile's mind as to produce disease,—the disease of insanity,—any more than the exposures and hardships he suffered would produce

fright (sickness or nervousness) an element of damage. Strange v. Railway Co., 61 Mo. App. 586. The court said: "The reason, as generally stated, for the rule excluding fright or mental distress of any kind in the measure of damages, except when accompanied by actual physical injury, is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation opened up so vast, that the courts should not establish such a rule. And it would seem quite clear that if the fright or distress of mind, unattended by bodily injury, cannot be made the basis of recovery, then, of course, the effects thereof cannot be." In an action for personal injuries sustained in a street-car collision, damages for impairment of plaintiff's nervous system, resulting from a nervous shock received at the time of collision, are not recoverable, in addition to damages for pain and suffering. "Such claims for compensation are subject to all the objection to remote and speculative damages." Washington & G. R. Co. v. Dashiell, 7 App. D. C. 507.

grippe, pneumonia, and any other disease. He sustained no bodily injury by the accident, so far as the petition shows, but it caused a shock and excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity." [3]

But, nevertheless, it is believed that the weight of authority in this country, as well as of reason, is in favor of the proposition that damages may be recovered for sickness caused by fright and shock. On this subject the supreme court of California has recently well said: "It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human system. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous systems, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body, rather than to the mind, even though the mind be at the

[3] Haile's Curator v. Railway Co., 9 C. C. A. 134, 60 Fed. 557. This decision appears to me to be somewhat questionable. We have seen that, where a passenger becomes ill by reason of his wrongful exposure by the carrier to the inclemency of the weather, the illness is the proximate consequence of the carrier's wrongful act. See ante, § 120. We have also seen that the carrier is liable for any latent disease developed by reason of injuries to the passenger caused by its wrongful act. See ante, § 123. It seems to me that these two principles would serve to fix the carrier's liability for insanity developed by reason of the passenger's exposure and excitement consequent on a railroad wreck, though he has suffered no other bodily hurt.

same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened or destroyed from causes primarily acting on the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action on the mind." [4] On this principle, it has been held that, where a female passenger is so frightened by a collision of trains that sickness and miscarriage result, she may recover for the sickness and miscarriage, though she sustains no outward physical injury.[5] So a woman who is obliged to throw herself on a station platform to escape being struck by a piece of timber projecting from a car in motion, and who has her health impaired by the fright

[4] Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320. In this case it was held that where, owing to the impaired physical condition of a female passenger, the mental excitement and humiliation attendant on being ordered from a train bring on an attack of insomnia and of nervous paroxysms, such injuries are an element of damages, though no force was used in making the expulsion, and though no other physical injuries were sustained. In Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034, it was held that if the negligence of a carrier places a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury.

[5] Fitzpatrick v. Railway Co., 12 U. C. Q. B. 645.

thus occasioned, is entitled to recover damages for such impairment of health.[6]

§ 533. REFUSAL TO ACCEPT PASSENGER.

For refusal to permit a passenger to take his train, plaintiff, in the absence of malice, wantonness, or circumstances of aggravation, is entitled to recover only such damages as are the immediate and necessary consequences of the wrongful act; that is to say, the expenses incurred by reason of the refusal, including the

[6] Buchanan v. Railroad Co., 52 N. J. Law, 265, 19 Atl. 254. Where a woman is compelled to alight in the nighttime from a train several hundred feet from a station, and falls into a cattle guard while necessarily walking along a side track, the jury, in awarding damages, may take into consideration her fright caused by cars being placed on the side track near the cattle guard while she was attempting to extricate herself therefrom. Stutz v. Railway Co., 73 Wis. 147, 40 N. W. 653. The court said: "We may admit, for the purposes of this case, that when the only ground of action against defendant is fright caused by the negligence of defendant, which is not followed by any injury to the person or the health of the plaintiff, and in no way affects her right of person and property, no action can be maintained We are of opinion, however, that in this case, and others of like character,—where the cause of action is not grounded upon mere fright or terror, but upon the wrongful act of the defendant in putting her off the car in a place of danger in the nighttime,—in measuring the plaintiff's injury it is not only competent, but it becomes essential, to determine the extent of plaintiff's injury, that all the surroundings of the wrongful act of the defendant should be taken into consideration, to render a just verdict." Where a passenger is jammed in and fastened by broken pieces of the train supporting the tender and locomotive, damages may be recovered for mental suffering while held in this position, during which time he was conscious of the risk of being crushed, and requested a bystander to kill him. Quinn v. Railroad Co., 34 Hun, 331.

amount paid for another ticket, and hotel expenses, if any; together with compensation for loss of time. In addition to these, inconvenience suffered by him may be ground of damage, if it is such as is capable of being ascertained or assessed at a money value. In the absence of wanton or reckless disregard of rights, and of insulting conduct by the gateman, exemplary damages for injury to feelings are not recoverable.[1] Where, in such a case, a passenger, instead of hiring a conveyance to his destination, undertakes to walk, he cannot recover for the bad effects thereof.[2] In Texas, however, it has been held that for failure to stop a train at a flag station on signal and receive an intending passenger, the measure of damages is the amount paid for the ticket, and compensation for such disappointment, inconvenience, and expense, and loss of time as is shown to have resulted directly and proximately from a failure to stop the train and receive the passenger.[3]

Where the ticket agent refuses to sell a passenger a ticket under the mistaken belief that the train he desires to take does not stop at his destination, and the conductor compels him to pay the higher train fare, the measure of damages is the difference between the ticket

§ 533. [1] Northern Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052. For the refusal of the conductor of a street car to stop on the signal of a colored person, exemplary damages are not recoverable; but she is entitled, at all events, to nominal damages, and to the actual damages she has sustained. Pleasants v. Railroad Co., 34 Cal. 586.

[2] Gulf, C. & S. F. Ry. Co. v. Cleveland (Tex. Civ. App.) 33 S. W. 687. See, also, ante, § 120.

[3] Gulf, C. & S. F. Ry. Co. v. Gaedecke (Tex. Civ. App.) 39 S. W. 312.

fare and the train fare, in the absence of insult or abuse by the conductor.[4]

§ 534. BREACH OF CHARTER PARTY AND OF CONTRACT FOR FREE PASS.

Where a vessel chartered to carry passengers is condemned as unfit for that purpose, the charterers, who have no other means of transporting the passengers procured by them, are entitled to recover the net profits they would have made in transporting the passengers actually procured. The prevention of these gains is a damage to the charterers which naturally arose from the breach of contract, and must also have been in contemplation of the parties thereto.[1] One who contracts with a railroad company for the transportation of excursionists at reduced rates, and whose contract, before the excursion, but after the sale of tickets at an advanced rate, is repudiated by the company, may recover as damages the profits he would have realized on the tickets shown with reasonable certainty that he would have sold, after deducting the expenses incurred in getting up the excursion.[2]

For breach of contract by a railroad company to furnish plaintiff and his family a free pass so long as he might live, the measure of damages is the value of the pass for plaintiff and his family, and not the actual

4 Courts v. Railroad Co. (Ky.) 36 S. W. 548.

§ 534. 1 Ye Seng Co. v. Corbitt, 9 Fed. 423.

2 Houston & T. C. Ry. Co. v. Hill, 63 Tex. 381; Id., 70 Tex. 51, 7 S. W. 659.

amount expended by him for fares, thus excluding damages because of nontravel.[3]

§ 535. FAILURE TO CARRY TO DESTINATION, AND DELAY IN TRANSPORTATION.

"It is a well-settled rule that where a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, such person is entitled to recover in all cases at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching the objective point by means of some other conveyance. * * * The rule of damage just stated is to be adopted, not only when the suit against the railroad company is brought for, or the proof confined to, the breach of the contract of carriage, but as well where the plaintiff elects to sue in tort, and rely upon the disregard of duty on the part of the carrier as a cause of action, unless it appear that plaintiff has suffered, in addition to the expense, loss of time, and inconvenience incident to every failure to comply with such a contract, some personal injury, of which the willful failure to transport him according to schedule time is a proximate cause." [1] Thus, for a carrier's failure to perform his contract to carry a passenger from New York to San Francisco via the Nicaragua route, the passenger is entitled to recover back his entire passage money, his expenses while detained on the Isthmus, and of his

[3] Erie & P. R. Co. v. Douthet, 88 Pa. St. 243.

§ 535. [1] Hansley v. Railroad Co., 115 N. C. 603, 20 S. E. 528.

journey back, and also for time lost and expenses incurred by a sickness contracted on the Isthmus by reason of defendant's breach of contract.[2] So, where a steamship company advertises to land passengers at a certain port, with knowledge that it cannot fulfill its contract, and that its vessels are prohibited from landing there, a passenger, who has taken passage in reliance

[2] Williams v. Vanderbilt, 28 N. Y. 217, affirming 29 Barb. 491. A passenger who has engaged passage from New York to San Francisco via Panama may abandon the voyage, if he is unreasonably detained at the Isthmus, and may recover as damages his entire transportation money paid to defendant, his expenses on the Isthmus, and of his journey back, and also for sickness contracted on the Isthmus as the immediate result of defendant's breach of contract. Van Buskirk v. Roberts, 31 N. Y. 661. But for delay in transporting a passenger who is a good bookkeeper the passenger is not entitled to recover as damages the wages of a good bookkeeper during the entire delay, without proof as to the probabilities of securing employment immediately on arriving at destination. Yonge v. Steamship Co., 1 Cal. 353. In an action for delay in the transportation of an attorney at law, the most trustworthy basis for estimating the amount of loss of his income is the amount he was earning at the time, and not the amount that other attorneys were earning at the time. Turner v. Railway Co. (Wash.) 46 Pac. 243. In an action for delay in transportation, plaintiff cannot recover for the expense of his sojourn at destination, in the absence of evidence that, if he had arrived at his destination on time, he would have accomplished his business promptly, and returned home without delay. Benson v. Transportation Co., 9 Bosw. (N. Y.) 412. Where one contracts with the master in a foreign port for a passage to this country, and pays a part of his passage money in advance, the vessel is responsible for the fulfillment of the agreement; and the libelant, on being compelled to complete his journey in another vessel, is entitled to recover the passage money paid in advance, the expenses incurred by him in awaiting the sailing of the other vessel, and the sum paid by him for his passage thereon. The Zenobia, Abb. Adm. 80, Fed. Cas. No. 18,209. As to recovery back of fare, see ante, § 274.

on the advertisement, is not restricted to a recovery of his actual pecuniary loss, but may, in addition, recover for bodily hardship and mental suffering caused by being landed at another port and among a hostile population.[3]

Where a connecting carrier refuses to carry a passenger to his destination, the measure of damages against the carrier selling the ticket is what it would have cost him to reach his destination by other means and other routes. If there are no other means or other routes, then the measure of damages is the expense of the journey, together with reasonable compensation for the time employed in the journey.[4] But a passenger thus delayed, who undertakes to reach his destination by other means, can recover only the reasonable expense of doing so. He cannot recover the cost of a special train which he ordered, that he might arrive at his destination an hour and a half sooner than he could if he awaited the next train.[5]

§ 536. CARRYING PAST DESTINATION.

A passenger on a railroad train, who is carried beyond his station by the negligence of the company, but

[3] Jones v. The Cortes, 17 Cal. 487.

[4] Central R. R. v. Combs, 70 Ga. 533.

[5] Le Blanche v. Railroad Co., 1 C. P. Div. 286. "The principle is that, if one party does not perform his contract, the other may do so for him, as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such a case as plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed in his journey, though through the default of the company, would have incurred the expenditure in question on his own account." Id.

without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, and labor and expense of traveling back; but not for anxiety and suspense of mind suffered in consequence of the delay, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off.[1] Nominal damages only can be recovered for carrying a passenger past her destination to a station two and a half miles beyond, where the company offered to carry her back to her destination on another train in the course of an hour, and, on her declining this offer, offered to take her back on a hand car, and where she finally walked back, without sustaining any injury, and without any pecuniary loss by reason of the delay.[2] But it has been held that a passenger on a steamer, who is carried past the place for which he has bought a ticket, and at which the steamer usually stops, and at which he intends to join a sailing vessel of which he is master, is entitled to recover, not only for his personal expenses and loss of

§ 536. [1] Trigg v. Railway Co., 74 Mo. 147. For putting a passenger off at a wrong station, the amount of his hotel bill and of the expense of getting to his destination are the only elements of damage, where no other injury resulted to plaintiff from the mistake. Carter v. Railroad Co. (Ky.) 34 S. W. 907.

[2] Judice v. Southern Pac. Co., 47 La. Ann. 255, 16 South. 816. But under the Georgia Code, where no actual damages are sustained by a passenger by reason of being carried past her destination, and the right of recovery is entirely for injury to her peace, happiness, or feelings, the damages can be arrived at solely by reference to the enlightened consciences of impartial jurors. Georgia Railroad & Banking Co. v. Jett, 95 Ga. 236, 22 S. E. 251.

time, but damages in the nature of demurrage for the detention of his vessel.[3]

§ 537. EJECTION.

The elements of compensatory damages for wrongful expulsion are:

1. **Compensation for pecuniary loss, for necessary inconvenience and physical hardship, and for proximate injury to health.**
2. **Compensation for wounded feelings.**[1]

A passenger whose ticket is wrongfully refused on a train, and who is expelled on refusal to pay fare a second time, is entitled to recover the cost of a ticket from the place where he was ejected to the place of destination. He is also entitled to recover such damages as he may have sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily incurred thereby, as well as reasonable damages for the indignity to which he was subjected in being expelled from the train; and if the conductor or brakeman, in a reckless and wanton manner, used more force than was reasonably necessary for the purpose of ejecting him, and in consequence of such excessive force the passenger was injured, it will be proper to give him such damages therefor as will fully compensate him for injuries resulting directly from the use of such excessive force.[2]

[3] The Canadian, Brown, Adm. 11, Fed. Cas. No. 2,376.

§ 537. [1] Georgia Railroad & Banking Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061.

[2] Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Id., 112 Ill. 295, 26 Ill. App. 594. The measure of damages in an ordinary

Something more than nominal damages are recoverable for the wrongful expulsion of a passenger for alleged nonpayment of fare, though without undue force, and at a station, and though no pecuniary loss or actual in-

case of wrongful expulsion, without unnecessary violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time. But when the expulsion is accompanied by undue violence, or by insult and abuse, the jury is authorized to consider the injured feelings of the plaintiff, the indignity endured, his mental suffering, the humiliation and wounded pride which one in his condition of life and standing in the community would experience, and to award him compensatory damages therefor. Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112. In an action for wrongful expulsion, the passenger may recover for his time, inconvenience, and the necessary expense to which he is subjected; and, if treated with violence or in an insulting manner, for the injuries to his person or feelings. Southern Kan. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817. For wrongful expulsion from a street car without application of physical force, damages are not limited merely to an amount sufficient to compensate plaintiff for the trouble and inconvenience caused by the delay in being put off the car, and the additional expense necessary to complete his journey. He is entitled to substantial damages for the inexcusable trespass. Laird v. Traction Co., 166 Pa. St. 4, 31 Atl. 51. 'For wrongful ejection without unnecessary force the passenger is entitled to recover such damages as will compensate him for the injuries actually inflicted, whether it be to his body or his mind, to his business, or loss of time, as well as his actual expenses necessarily incurred in consequence of the unlawful or wrongful act. Quigley v. Railroad Co., 11 Nev. 350. For the wrongful ejection of a passenger without violence, the passenger may recover the value of the unused portion of the ticket, and for the inconvenience, loss of time, and necessary expenses. Houston & T. C. R. Co. v. Crone (Tex. Civ. App.) 37 S. W. 1074. A passenger wrongfully ejected from a train, though without force, is not limited to an action for breach of contract, but may sue in tort, and recover all damages sustained through the company's violation of the duties it assumed in entering into such a contract of

jury to his person is proven.[3] But a passenger who wrongfully refuses to pay fare can recover only nominal damages for being ejected from a railroad train at a place other than a usual stopping place, in violation of statute, unless actual personal or pecuniary damages have ensued.[4]

§ 538. SAME—HUMILIATION AND MORTIFICATION.

Mental suffering arising from the humiliation and degradation of being expelled in the presence of other passengers is an element of compensatory damages;[1]

carriage. Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320. A passenger wrongfully expelled from a train may elect to sue only for breach of contract, and, if he does so elect, his recovery will be limited to nominal damages, if he fails to prove any special damages. But if he sues for the tort, though no special damages are proved, proof of the tort and the circumstances attending it will entitle plaintiff to recover, under the Georgia Code, such amount as the enlightened consciences of an impartial jury will sanction as fit for plaintiff to have and defendant to pay. Central Railroad & Banking Co. v. Roberts, 91 Ga. 513, 18 S. E. 315. The worldly circumstances of the parties cannot be taken into consideration in an action for the ejection of a passenger, though Code Ga. 1882, § 3067, authorizes them to be taken into consideration in tort where the entire injury is to the peace, happiness, or feelings of the plaintiff. Atlanta Consol. St. Ry. Co. v. Hardage, 93 Ga. 457, 21 S. E. 100.

[3] Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584; Toledo, St. L. & K. C. R. Co. v. Kid, 29 Ill. App. 353. In an action of tort for the forcible ejection of a passenger from a depot, it is error to instruct that if plaintiff has failed to prove any damages, either actual or possible, the verdict should be for defendant. The law implies damages for every wrong. Rose v. Railway Co., 70 Miss. 725, 12 South. 825.

[4] St. Louis, I. M. & S. Ry. v. Branch, 45 Ark. 524; Chicago & A. R. Co. v. Roberts, 40 Ill. 503.

§ 538. [1] Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Pittsburgh,

and this is especially true where the expulsion is accompanied with insulting language or conduct.[2] But plaintiff may recover such damages, though no force or violence, and no ungentlemanly acts or words, were used by the conductor.[3]

The divergence of views that exists as to the right to eject a passenger when there is a mistake in his ticket has already been noticed.[4] In conformity to one line of authorities, it has been held that where a conductor, in good faith, and without unnecessary force, ejects a passenger who rightfully refuses to pay the higher train fare because he has had no opportunity to purchase a ticket, the corporation is not liable for indignities suffered by the passenger.[5] But by the great weight of authority the passenger in such a case is en-

C., C. & St. L. Ry. Co. v. Berryman, 11 Ind. App. 640, 36 N. E. 728; Perry v. Railway Co., 153 Pa. St. 236, 25 Atl. 772; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49; Rown v. Railroad Co., 34 Hun (N. Y.) 471; Quigley v. Railroad Co., 5 Sawy. 107, Fed. Cas. No. 11,510; Smith v. Railway Co., 23 Ohio St. 10. In an action for ejection, compensatory damages include mental suffering resulting from a sense of wrong or insult. Robinson v. Railway Co. (Wis.) 68 N. W. 961.

[2] Shepard v. Railway Co., 77 Iowa, 55, 41 N. W. 564; Randolph v. Railway Co., 18 Mo. App. 609; Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

[3] Willson v. Railroad Co., 5 Wash. 621, 32 Pac. 468, and 34 Pac. 146. The indignity suffered by reason of a wrongful expulsion from a train is a proper subject of compensation, whether the act is wanton, malicious, or willful, or whether it is merely negligent or mistaken. The mental suffering thereby occasioned is a ground of damage quite apart from the matters which distinctly give rise to vindictive damage. Lake Erie & W. R. Co. v. Christison, 39 Ill. App. 495.

[4] See ante, § 317 et seq.

[5] Atchison, T. & S. F. R. Co. v. Hogue, 50 Kan. 40, 31 Pac. 698.

titled to recover for the humiliation and degradation, both where he is ejected on his refusal to pay additional fare,[6] and also where he does pay it to avoid the ejection.[7] In Iowa the authorities on this subject are not uniform; but it has recently been held that in an action for the removal of a female passenger from a train, in the presence of her friends and schoolmates, mental suffering and anguish are proper elements of damage, though not accompanied by any physical injury, and though no excessive force was used, and though the conductor acted in good faith, under the belief that a

[6] Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Delaware, L. & W. R. Co. v. Walsh, 47 N. J. Law, 548, 4 Atl. 323. Though a ticket may have the appearance of having been tampered with, and though the conductor may reasonably conclude that it was not good on his train, yet if he uses harsh and unnecessary language, calculated to insult and wound the passenger's feelings, and compels him to leave the train, the passenger may recover for wounded feelings and mental suffering if it turns out that the ticket was in fact good; and he is not limited merely to the amount of fare from the place where he was ejected to destination, though he completes his journey on the same train. McGinniss v. Railway Co., 21 Mo. App. 399. A passenger boarded a train at a station where no tickets were sold, and paid full fare to the conductor to his destination. The conductor afterwards demanded an additional fare, claiming that the passenger had not paid full fare before. The passenger refused, and the conductor stopped the train, when the passenger offered to pay the additional fare demanded, which the conductor refused to accept, and compelled him to get off. Held, that the passenger's right to damage was not limited to the amount of fare from the place of ejection to that of his destination, but that he could recover for mental and physical pain, insult, and humiliation. Boster v. Railway Co., 36 W. Va. 318, 15 S. E. 158.

[7] Pennsylvania Co. v. Bray, 125 Ind. 228, 239, 25 N. E. 439; Chicago & E. I. R. Co. v. Conley, 6 Ind. App. 9, 32 N. E. 96, 865.

pass presented by her when he demanded fare was not good.[8]

But one who enters a railway train with the expectation and desire that he should be put off, in order that he may recover from the railroad company the penalty for charging more than the statutory rate of fare, can recover nothing for wounded feelings or pain of mind,

[8] Curtis v. Railway Co., 87 Iowa, 622, 54 N. W. 339. In this case the court said: "It is to be kept in mind that these damages are compensatory, not punitive; and they are allowed and measured, not by the intent of the wrongdoer, but as a result of his wrongful acts; and hence no technical precision as to what constitutes an insult or indignity, if, indeed, they are essential to a recovery, should control, but that which would be the equivalent of an insult or indignity in its effect upon the party injured. We think it almost incredible that any person of ordinary pride and self-respect could thus be removed from the train without a feeling of deep humiliation, and a wounded pride amounting to mental anguish. Mental suffering, we know, is often poignant, and many times fatal to health or life. The authorities seem to be somewhat in conflict, but we have discovered no reason to justify a distinction; nor can we imagine a reason why the law would compensate for a pain to the hand or foot, and not for mental suffering, equally severe and dangerous, where it is not evidenced by physical injuries, nor indivisibly connected therewith." But in Fitzgerald v. Railroad Co., 50 Iowa, 79, it was held that where a conductor of a train mistakenly enforces a valid rule of the corporation, and with no more sternness and rigor than necessary to enforce obedience, and, without insult or violence, ejects a passenger from a train, compensatory damages for injured feelings or mental anguish are not recoverable. In Paine v. Railroad Co., 45 Iowa, 569, it was held that a passenger who has been unable to procure a ticket, because the ticket office was closed, and who pays the higher train fare when threatened with ejection by the conductor, cannot recover compensatory damages for injured feelings and mental suffering, where the conductor was not guilty of malice or wantonness, but was conscientiously endeavoring to carry out a wholesome rule of the company.

for to the willing mind there is no injury.[9] Neither can there be any recovery for injury to the reputation of the ejected passenger. For such an injury the well-understood remedy is an action for slander or libel, and it cannot form the proper ground for an award of damages in an action for assault and battery, or for wrongful expulsion from a car.[10]

§ 539. SAME—INCONVENIENCE.

If a passenger is wrongfully ejected from a railroad train, the jury, in fixing the amount of damages, may take into consideration the inconvenience he was put to in being ejected.[1] But a passenger who knows that an unlawful claim for fare will be made on him by a bridge company when crossing its bridge during the night, and who refuses to pay that fare to the railroad conductor before retiring for the night, cannot recover

In Michigan it has been held that a passenger who receives no check from the conductor on surrendering his ticket, and who refuses to pay fare a second time when demanded, but who offers to identify himself, may recover from the railroad company, for his ejection at a distance from the station, not only those damages termed "actual damages," but for whatever injury to his feelings, or of indignity, pain, or disgrace, such conduct would tend to produce, in view of the time, place, and circumstances. Lucas v. Railroad Co., 98 Mich. 1, 56 N. W. 1039.

[9] St. Louis & S. F. Ry. Co. v. Trimble, 54 Ark. 354, 15 S. W. 889; Cincinnati, H. & D. R. Co. v. Cole, 29 Ohio St. 126.

[10] Southern Kan. Ry. Co. v. Hinsdale, 38 Kan. 507, 16 Pac. 937; Schmitt v. Railway Co., 89 Wis. 195, 61 N. W. 834.

§ 539. [1] Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352; Boehm v. Railway Co., 91 Wis. 592, 65 N. W. 506. See, in this connection, ante, § 121.

damages for personal discomfort and inconvenience sustained by being awakened by the bridge conductor during the night for the purpose of demanding fare.[2]

§ 540. SAME—EXCESSIVE FORCE.

For using unlawful force in ejecting a person wrongfully on the train, his damages are restricted to the direct consequences of that wrong, and include not only any physical pain he may have suffered as the direct result of that force, but also any mental suffering which resulted from accompanying insults, if any such insults in fact accompanied it. It, however, does not include compensation for his inconvenience in having to make his way back to the station in the nighttime, his suffering from the exposure to cold, or his sickness, if any, consequent upon that exposure.[1]

§ 541. FALSE IMPRISONMENT.

For false imprisonment, as for trespass in improperly ejecting a passenger from the cars, compensatory damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to the feelings.[1]

[2] Southern Pac. Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

§ 540. [1] Texas Pac. Ry. Co. v. James, 82 Tex. 306, 18 S. W. 589.

§ 541. [1] Duggan v. Railroad, 159 Pa. St. 248, 28 Atl. 182, 186; Perry v. Railway, 153 Pa. St. 236, 25 Atl. 772.

CHAPTER XXXVII.

EXEMPLARY DAMAGES.

§ 542. Definition, and When Recoverable.
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§ 542. DEFINITION, AND WHEN RECOVERABLE.

Exemplary, punitive, or vindictive damages are damages inflicted by way of punishment upon a wrongdoer, as a warning to him and others to prevent a repetition or commission of similar wrongs.[1]

Such damages may be awarded by the jury in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appears.

In England and in nearly all of the American states exemplary damages, in addition to compensation, are

§ 542. [1] Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58.

allowed where a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. There must be some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference of consequences.[2] But when there has been no intentional offense committed, when a party has done what he honestly believed to be his duty, punishment is not deserved. There is no occasion for an example, for none is necessary. It is only to cases of moral wrong, recklessness, or malice that this public consideration applies.[3]

The doctrine of exemplary damages has been vigorously criticised in certain quarters, on the ground that it is unjust to allow plaintiff anything beyond compensation for injuries sustained, including mental suffering, and to inflict a pecuniary punishment on defendant, and donate it to plaintiff, instead of the state. In some jurisdictions, therefore, recovery of exemplary

[2] Railway Co. v. Lee, 90 Tenn. 570, 18 S. W. 268; Louisville, N. & G. S. R. Co. v. Guinan, 11 Lea (Tenn.) 98; Same v. Fleming, 14 Lea (Tenn.) 128, 152; Samuels v. Railroad Co., 35 S. C. 493, 14 S. E. 943; Atchison, T. & S. F. R. Co. v. Chamberlain (Okl.) 46 Pac. 499. "The malice spoken of in the rule is not merely the doing of an unlawful act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." Spellman v. Railroad Co., 35 S. C. 475, 14 S. E. 947. In Connecticut the expenses of plaintiff in the prosecution of his suit, exceeding the taxable costs, may be taken into consideration in estimating exemplary damages. Dalton v. Beers, 38 Conn. 529.

[3] Hamilton v. Railroad Co., 53 N. Y. 25, reversing 35 N. Y. Super. Ct. 118.

damages is denied as unsound in principle.[4] In a few others, exemplary damages are restricted to cases where the wrongful act is not also punishable as a crime.[5] But the weight of authority, both in this country and in England, is so decidedly in favor of the right to recover exemplary damages in the classes of cases specified above, that the question can no longer be considered an open one.[6]

§ 543. IN CASES WHERE THERE HAS BEEN NO ACTUAL DAMAGE.

It is held by some of the courts that where plaintiff has sustained merely nominal damages,—that is, where a right is invaded, and there is no evidence of actual

[4] Spokane, T. & D. Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072. In Sedg. Dam. § 358, it is said that the doctrine of exemplary damages is not recognized in Massachusetts, Nebraska, New Hampshire, Michigan, and Colorado. The following cases are cited: Spear v. Hubbard, 4 Pick. (Mass.) 143, 145; Sampson v. Henry, 11 Pick. (Mass.) 379, 388; Barnard v. Poor, 21 Pick. (Mass.) 378; Riewe v. McCormick, 11 Neb. 261, 9 N. W. 88; Fay v. Parker, 53 N. H. 342; Bixby v. Dunlap, 56 N. H. 456; Wilson v. Bowen, 64 Mich. 133, 141, 31 N. W. 81; Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815; Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119; Greeley, S. L. & P. Ry. Co. v. Yeager, 11 Colo. 345, 18 Pac. 211. See, also, Lucas v. Railway Co., 98 Mich. 1, 56 N. W. 1039. But in Colorado exemplary damages are now recoverable by force of statute. Denver T. Co. v. Cloud, 6 Colo. App. 445, 40 Pac. 779. In Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485, it was held, in an elaborate opinion, that exemplary damages cannot be recovered in a civil action. But this case has been overruled. Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58.

[5] Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606.

[6] It should be borne in mind that damages for mental suffering are recoverable as compensatory, and not exemplary, damages. Head v. Railway Co., 79 Ga. 358, 7 S. E. 217.

damage,—there is no foundation upon which exemplary damages can attach or rest.[1] But other courts hold that, to authorize the imposition of exemplary damages, it is not necessary that plaintiff should have sustained any actual damages.[2] "The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter from its repetition." "Many acts denounced as crimes by our statutes, or by common law, involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages, as compensation, beyond a merely nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by smart money; and, on the same principle, acts readily conceivable which involve malice, willfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crimes, and inflicting no pecuniary loss or detriment measurable by a money standard on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages." [3]

§ 543. [1] Kuhn v. Railway Co., 74 Iowa, 137, 37 N. W. 116; Stacy v. Publishing Co., 68 Me. 279; Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Ganssly v. Perkins, 30 Mich. 492; Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657.

[2] Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 9 South. 375; Wilson v. Vaughn, 23 Fed. 229; Hefley v. Baker, 19 Kan. 9.

[3] Alabama G. S. R. Co. v. Sellers, supra.

§ 544. PROVINCE OF COURT AND JURY.

Where the proof fails to show anything that will warrant an imputation of malice, willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitory damages. Not to do so, in a case free from doubt, would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law.[1]

But where there is evidence reasonably tending to show that defendant acted maliciously, willfully, or recklessly, it is within the exclusive province of the jury to determine whether or not they will award exemplary damages. It is prejudicial error for the court, in such a case, to instruct the jury that plaintiff is "entitled" to such damages.[2]

§ 544. [1] Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Chicago v. Martin, 49 Ill. 241; Heil v. Glanding, 42 Pa. St. 493; Kennedy v. Railroad Co., 36 Mo. 351; Illinois Cent. R. Co. v. Welch, 52 Ill. 183; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489. But in Samuels v. Railroad Co., 35 S. C. 493, 14 S. E. 943, it was held to be the province of the jury, and not of the judge, to determine whether or not the acts complained of were done maliciously or willfully, so as to justify the award of exemplary damages.

[2] Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296. Exemplary damages cannot be recovered as a matter of right, but the awarding of such damages is within the discretion of the jury. Robinson v. Railway Co. (Wis.) 68 N. W. 961.

§ 545. CORPORATIONS.

It was at one time contended that, since a corporation could not act willfully or maliciously, exemplary damages could not be recovered against it. But this contention found little favor with the courts; and it is now the settled law that corporations, like natural persons, are liable in exemplary damages when the facts of the case will warrant the jury in awarding them.[1] But, since a corporation acts only through its agents and employés, the question still remains to be considered whether a master is liable in exemplary damages for the torts of his servants.

§ 546. LIABILITY OF MASTER FOR TORTS OF SERVANT.

The rule adopted by the federal supreme court and by some of the state courts is that a master is not liable in exemplary damages for the willful, wanton, and oppressive acts of his servant which he has in no way authorized or ratified. But in many of the states the rule is that exemplary damages may be recovered against a master for the torts of his servant, acting within the scope of his employment, whenever such damages could be recovered against the servant were the action against him.

§ 545. [1] Malecek v. Railway Co., 57 Mo. 17; Jeffersonville R. Co. v. Rogers, 28 Ind. 1; Spelman v. Railroad Co., 35 S. C. 475, 14 S. E. 947; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 152.

That a master may be held liable in exemplary damages for the torts of his servant has been expressly held in Alabama,[1] Georgia,[2] Kentucky,[3] Maine,[4] Ohio,[5] South Carolina,[6] Tennessee,[7] and probably Pennsylvania.[8] The same ruling has also been made by implication in other states.[9] The reasons for so holding are probably nowhere better stated than they have been by the supreme court of Maine. "We confess that it seems to us that there is no class of cases where the

§ 546. [1] Mobile & O. R. Co. v. Seales, 100 Ala. 368, 13 South. 917.

[2] Gasway v. Railroad Co., 58 Ga. 216.

[3] Exemplary damages are recoverable against a railroad company for the negligence of one of its conductors in running a passenger train contrary to orders received, thus causing a collision with another train; and it is immaterial that the conductor was competent, and selected with due care. Louisville & N. R. Co. v. Kelly's Adm'x (Ky.) 38 S. W. 852.

[4] Hanson v. Railway Co., 62 Me. 84; Goddard v. Railway Co., 57 Me. 202.

[5] Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162.

[6] Palmer v. Railroad, 3 S. C. 580; Quinn v. Railroad Co., 29 S. C. 381, 386, 7 S. E. 614.

[7] Louisville & N. R. Co. v. Garrett, 8 Lea (Tenn.) 438.

[8] In Philadelphia T. Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816, it is said: "In Pennsylvania, since the case of Lake Shore R. Co. v. Rosenzweig, 113 Pa. St. 535, 6 Atl. 545, the rule would seem to have been settled in accordance with the preponderance of the cases. * * * There may be grave doubt expressed as to the propriety of the rule; but, if the doctrine of this case is adhered to, the responsibility of a corporation in exemplary damages for the wanton and willful acts of the servants is clearly established in Pennsylvania. * * * The well-known disposition of juries to return excessive verdicts in this class of cases has shown that the doctrine, although designed for the promotion of the public good, is capable of great practical abuse. It is upon this ground, more than any other, perhaps, that the rule has not been universally recognized."

[9] See post, §§ 550–553.

doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat or insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds, and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a 'corporation.' And yet, under cover of its name and authority, there is in fact as much wickedness, and as much as is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, nor put in the stocks, since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss, it does seem to us that the doctrine of exemplary damages is more ben-

eficial in its application to them than in its application to natural persons." [10]

But the weight of recent authority, and, it would seem, of reason, is probably the other way. On this subject, the supreme court of the United States has recently said: "Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment against the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent. * * * The rule has the same application to corporations as to individuals. * * * No doubt, a corporation, like a natural person, may be held liable for exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. * * * The president and general manager, or, in his absence, the vice president, in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation, and identified with it, that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of

[10] Goddard v. Railway Co., 57 Me. 202.

a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce." [11] It was accordingly held that a principal is not liable in exemplary damages for the willful, wanton, and oppressive acts of his agent, which he has in no way authorized or ratified. This, of course, is now the rule in all the federal courts,[12] and it also obtains in California,[13] Missouri,[14] New York,[15] Oregon,[16] Rhode Island,[17] Texas,[18] West Virginia,[19] and Wisconsin.[20]

[11] Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261.

[12] Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822. Earlier cases decided in the district and circuit courts, holding the other way, are necessarily overruled by these decisions. Beale v. Railway Co., 1 Dill. 568, Fed. Cas. No. 1,159; Gallena v. Railroad, 13 Fed. 116; Fell v. Railroad Co., 44 Fed. 248.

[13] Turner v. Railroad Co., 34 Cal. 594. A railroad company is not liable in vindictive or exemplary damages on account of a wanton or malicious act of a conductor of one of its trains towards a passenger in executing the authority given him, unless the malicious act was either authorized or ratified. It is at most liable only for the actual damages sustained. Warner v. Southern Pac. Co., 113 Cal. 105, 45 Pac. 187.

[14] Rouse v. Railway Co., 41 Mo. App. 298; Randolph v. Railway Co., 18 Mo. App. 609.

[15] Cleghorn v. Railroad Co., 56 N. Y. 44; Muckle v. Railway Co., 79 Hun, 32, 29 N. Y. Supp. 732; Donivan v. Railway Co., 1 Misc. Rep. 368, 21 N. Y. Supp. 457; Fisher v. Railway Co., 34 Hun, 433; Murphy v. Railroad Co., 48 N. Y. Super. Ct. 96.

[16-20] See notes 16–20 on following page.

§ 547. SAME—RATIFICATION OF SERVANT'S ACTS.

Even in states where the master's or principal's liability in exemplary damages is denied as a general proposition, it is nevertheless held that he may become so liable by ratifying the servant's torts.[1] Where a railroad company retains a brakeman in its service, and even promotes him to a position of greater responsibility, after notice of tortious acts committed by him against a passenger, for which he would be liable in punitory damages, there is no error in submitting to the jury the question whether it had ratified such acts.[2] But the mere retention of the servant, after his willful tort, without proof of knowledge by the master of the tortious quality of the act, is insufficient to authorize

[16] Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. 508.

[17] Hagan v. Railroad Co., 3 R. I. 88.

[18] Hays v. Railroad Co., 46 Tex. 272; Galveston, H. & S. A. Ry. Co. v. Donahoe, 56 Tex. 162; Texas T. Ry. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482; Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105.

[19] Ricketts v. Railway Co., 33 W. Va. 433, 10 S. E. 801.

[20] Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Craker v. Railway Co., 36 Wis. 657, 675, 676; Bass v. Railway Co., 42 Wis. 654, 39 Wis. 636; Patry v. Railway Co., 77 Wis. 218, 46 N. W. 56; Mace v. Reed, 89 Wis. 440, 62 N. W. 186. Exemplary damages can be recovered against the principal for the wrongful and malicious act of the agent only when such act is either authorized or ratified by the principal. Robinson v. Railway Co. (Wis.) 68 N. W. 961.

§ 547. [1] See, also, ante, § 351.

[2] Bass v. Railway Co., 42 Wis. 654. The retention of a conductor in the employment of a street-railway company, with knowledge that he has maliciously ejected a passenger from the car, is a ratification of the wrongful act, and renders the company liable in exemplary damages. Robinson v. Railway Co. (Wis.) 68 N. W. 961.

an inference of a ratification.[3] In Texas it has even been held that ratification will not be presumed, as matter of law, from the mere retention of the servant in the master's employment, with knowledge of his misconduct.[4]

§ 548. GROSS NEGLIGENCE.

Exemplary damages are not recoverable for personal injuries caused by mere negligence;[1] but gross negli-

[3] Donivan v. Railway Co., 1 Misc. Rep. 368, 21 N. Y. Supp. 457.

[4] Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139. In this case it was said: "The whole doctrine of ex post facto animus as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought." The dismissal of a conductor who has committed an unjustifiable assault on a passenger will not relieve the company from liability, but it will prevent the plaintiff from recovering exemplary or punitive damages. Randolph v. Railway Co., 18 Mo. App. 609. A regulation of a railroad company requiring conductors to take up mileage tickets when presented by one other than the original purchaser, and to collect full fare, does not render the company liable in exemplary damages for the wanton act of the conductor in ejecting the original purchaser of such a ticket on a charge of impersonating such purchaser. Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822. Nor is the company rendered liable in such damages by the fact that its general ticket agent was on the train, and that the conductor conferred with him about the ticket, where it is not shown that such agent had authority over the conductor, or that he attempted to influence the latter's action. Id.

§ 548. [1] Wardrobe v. Stage Co., 7 Cal. 118; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Ackerson v. Railway Co., 32 N. J. Law, 254. Thus, exemplary damages cannot be recovered for injuries to a passenger caused by the derailment of a train owing to the negligence of the company. Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83. Nor can exemplary damages be recovered for injuries sus-

gence will authorize the jury to award such damages.[2] Gross negligence, within the meaning of this rule, has been defined to be that entire want of care which raises the presumption of a conscious indifference to consequences. The ordinary meaning of the term, as a greater want of care than ordinary negligence, does not go quite far enough to define its meaning when used as the basis for exemplary damages.[3]

The employment of a known drunken driver by a stagecoach company is gross negligence, within the meaning of this rule.[4] So is the failure of a railroad

tained by the negligent starting of a train while a passenger was alighting, in the absence of any evidence indicating malice or oppression, or any willful, wanton, or deliberate disregard of the rights of the injured passenger, on the part of the train hands. Atchison, T. & S. F. R. Co. v. Stewart, 55 Kan. 667, 41 Pac. 961.

[2] Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15; Kansas Pac. Ry. v. Lundin, 3 Colo. 94; Wall v. Cameron, 6 Colo. 275; Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357; Varillat v. Railroad Co., 10 La. Ann. 88.

[3] Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489; Richmond & D. R. Co. v. Vance, 93 Ala. 146, 9 South. 574; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 South. 337; Chattanooga R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Hansley v. Railroad Co., 115 N. C. 602, 20 S. E. 528; Missouri Pac. Ry. Co. v. Shuford, 72 Tex. 165, 10 S. W. 408; Missouri Pac. Ry. Co. v. Mitchell, 72 Tex. 171, 10 S. W. 411. But in Maysville & L. R. Co. v. Herrick, 13 Bush (Ky.) 122, it was held that, to enable a passenger to recover punitive damages for personal injuries, it is not necessary to show the absence of all care, or reckless indifference to the safety of passengers, or intentional misconduct, but proof of gross negligence is sufficient. In Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264, it was held that punitive damages are recoverable for the gross negligence of the servants of a railroad company.

[4] Frink v. Coe, 4 Greene (Iowa) 555.

company to notify a ticket agent of a rule prohibiting passengers from riding on freight trains for more than a month after it was made; and exemplary damages may be awarded in favor of a passenger who bought a ticket and got on a freight train in reliance on the ticket agent's statement that he could ride on that train, and who was afterwards ejected by the conductor in obedience to the rule.[5] But failure of a railroad company to light its platform at a station is not such willful, wanton, or reckless negligence as will authorize the recovery of exemplary damages.[6] Nor does knowledge by the officers of a railroad company of the rotten condition of the ties render the company liable in punitive damages for personal injuries sustained in the derailment of a car, where the derailment would not have occurred but for the intervention of the breaking of a bolt, the defective condition of which was unknown and not suspected.[7]

[5] Kansas Pac. Ry. Co. v. Kessler, 18 Kan. 523.

[6] Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 359.

[7] Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 South. 574. "When a injury is produced by the co-operation of two independent causes, the existence of one of which is unknown, and the other insufficient to produce the result without the co-operation of the unknown cause, knowledge of the existence of such other cause does not make a case for the allowance of punitive damages. The proposition seems logically to follow from the principle that consciousness of the probable injurious consequences of one's conduct, or omission of duty, is an essential element of reckless, wanton, or intentional negligence." Id. The employment, as a bridge tender, of a person unable to read or write, is not such gross negligence or wanton neglect as will render a railroad company liable in exemplary damages to a passenger on a train injured by the negligence of this employé. Brooks v. Railroad Co., 30 Hun, 47. Exemplary damages cannot be recovered for per-

Gross negligence on the part of the servants of a corporation will warrant the imposition of exemplary damages on the corporation in those states where it is thus liable for the acts of its servants.[8] Thus where a passenger train running at the rate of 30 or 40 miles per hour is not only not brought to a standstill near a crossing with an intersecting road, as required by statute, but its speed is not even slackened, the jury is justified in finding the engineer of the passenger train guilty of wanton, willful, and reckless indifference to probable results, and to impose punitive damages in an action for personal injuries sustained in a collision with an engine on the crossing.[9] So where a passenger is wrongfully ejected from a train in the nighttime in the company's yards, with which he is entirely unfamiliar, and through which trains and engines are constantly passing, the company is liable in punitive

sonal injuries caused by a roadbed in a very bad condition, where it appears that the road was being repaired when the accident happened, that the running time of trains had been reduced in the interest of safety, and that the rail broke in an unusual spell of winter weather. International & G. N. Ry. Co. v. Brazzil, 78 Tex. 314, 14 S. W. 609.

[8] Hopkins v. Railroad, 36 N. H. 9.

[9] Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495. The fact that the engineer had no actual knowledge of the approach of the train on the intersecting road does not relieve the company from exemplary damages. The knowledge of danger upon which, in the absence of subsequent diligence to avoid its consequences, a charge of wantonness might be sustained, need not be that which is presently acquired through the physical senses. The party charged need not, on the particular occasion, see or hear, or through sense become advised of the actual presence of, every element necessary to constitute the danger that really exists. Id.

damages for injuries sustained while he was endeavoring to find his way out of the yards, though the conductor used no unnecessary force in making the expulsion.[10] Where there are successive acts of negligence on the part of defendant's employés, resulting ultimately in injury to a passenger, the jury may, in determining the degree of culpability of defendant, look to the chain of causation for the wrong done for which they are to fix the amount of damages.[11]

§ 549. POVERTY OF DEFENDANT.

The want of means and of credit, preventing a railroad company from making repairs of its track, does not relieve it from liability in exemplary damages to a passenger injured by its gross negligence in this respect. "A corporation or an individual who attempts to conduct a business, public in its character, in the course of which lives and limbs of persons dealing with it are imperiled, is held responsible in exemplary damages, whenever the means used to conduct the business are so manifestly insufficient to enable them to conduct business safely as to manifest indifference to duty or reckless disregard for the safety of persons. * * * If the company has not the means to place its road in safe condition, it should cease to use it for the transportation of passengers; but if it elects not to do this, and for any reason continues to hold itself out as a carrier of passengers, and receives them when its

10 Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 543, 544, 6 Atl. 545.

11 Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57.

appliances are known to be insufficient, when carefully used, for the safe conduct of such a business, then, so long as damages are given for the purpose for which it is said exemplary damages are given, it must be held that such damages may be properly imposed." [1] But, nevertheless, the wealth or poverty of a defendant has an important bearing as to the amount of money which shall be awarded against him for exemplary damages. What would be sufficient damages by way of example and of punishment for a day laborer, without means, would be nothing by way of punishment or example to a wealthy corporation.[2]

§ 550. FAILURE TO ACCEPT AND CARRY PASSENGER.

Exemplary damages may be recovered against a railroad company for the willful, reckless, or capricious failure of its employés to stop a train at a flag station, if they see the signals to stop, and willfully disregard them; [1] and also against a vessel owner for his violation of duty in willfully and capriciously refusing to land his vessel, and receive plaintiff on board as a passenger, according to his advertisement.[2] It has even been held that exemplary damages are recoverable against a railroad company which runs its train past one of its regular stations where it is scheduled to stop,

§ 549. [1] Texas T. Ry. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482. See, also, ante, § 13.

[2] Belknap v. Railroad, 49 N. H. 358. See, also, ante, p. 1150.

§ 550. [1] Wilson v. Railroad Co., 63 Miss. 352.

[2] Heirn v. McCaughan, 32 Miss. 17.

if there is room for passengers on that train, or if, the train being crowded, the company, by reasonable diligence, could have ascertained that the number of cars is insufficient, and made no effort to supply that deficiency.[3]

But punitive damages will not be awarded against a railroad company, where, by reason of defective equipments, it failed to carry a person, to whom it had sold an excursion ticket, back to his starting point, on the day named in the ticket, when the only injuries complained of were inconvenience, delay, and disappointment, and there is no proof of bad motive on the part of the company.[4] Neither are such damages recoverable

[3] Purcell v. Railroad Co., 108 N. C. 414, 12 S. E. 954, 956. This case was overruled in Hansley v. Railroad Co., 115 N. C. 602, 20 S. E. 528; but it was reinstated as an authority in Hansley v. Railroad Co., 117 N. C. 565, 23 S. E. 443.

[4] Hansley v. Railroad Co., 115 N. C. 602, 20 S. E. 528; Brooks v. Railway Co., 115 N. C. 624, 20 S. E. 535; Hansley v. Railway Co., 117 N. C. 565, 23 S. E. 443. The following extract from the opinion in Hansley v. Railroad Co., 115 N. C. 602, 616, 20 S. E. 528, 532, is given to show the difficulties of railroading in certain sections of North Carolina: "We cannot shut our eyes to the history of railways in North Carolina, and the daily development of the country by new branch lines, built first for the transportation of lumber, and gradually extending their business as carriers to other freight, until at last, though the corporation has not been able to purchase more than two or three engines and a single passenger car, with few appointments, its patrons induce it to transport passengers, in order that they may have the advantage of saving time and expense by substituting such a conveyance as an improvement on a road wagon or other vehicle. We are not disposed to check the process of evolution which we see around us, from a lumber road into a comfortable line for passengers, as the business justifies the change. Even where a road seems to be retrograding, we see no reason why we should interfere, with a harsh

for the negligence of a railroad employé in directing an intending passenger into a sleeping car, which was cut out of the train, and left at the station, though this occurred late at night, and the passenger had a sick child, and his baggage and medicines were carried away on the train. Exemplary damages can be awarded only when malice or its equivalent is present; and no mere inadvertence, mistake, or accident can be malicious, though it may be negligent.[5]

§ 551. CARRYING PAST DESTINATION.

Exemplary damages may be recovered for carrying a passenger past his destination, if the train was run by the station willfully, in disregard of the passenger's rights to have it stopped there.[1] Such damages are re-

rule, such as would have stopped the operation of the Raleigh & Gaston road nearly 50 years ago, with the best efforts of our distinguished Gov. Graham, representing the state as principal stockholder, and running it with poor equipments, and constant danger of injury to passengers by derailments and snakeheads, and frequent delays of many days to purchasers of tickets. History has repeated itself in the gradual improvement of the roadbed and equipment of the Western North Carolina Railroad. If the ax is to be brought to the root of the tree, by stopping these roads from transporting persons at all unless the conditions be improved, the legislature has wisely attempted to vest the necessary power in the railroad commission to accomplish this end, either by ordering a cessation of operations, or the improvement of the roadbed and the purchase of new equipments. Meantime, neither the law, fairly interpreted, nor considerations of public policy, warrant the adoption of so harsh a rule as that proposed."

[5] Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. 809.

§ 551. [1] Vicksburg & M. R. Co. v. Scanlan, 63 Miss. 413; Samuels v. Railroad Co., 35 S. C. 493, 14 S. E. 943.

coverable where there is evidence that the train failed to stop at the station, that the name of the station was not called, and that the conductor was intoxicated, and used profane and insulting language to plaintiff.[2] So such damages have been held recoverable for carrying a female passenger several hundred yards beyond the station house, compelling her to alight in a drenching rain, and to walk back, with a baby and a valise in her arms.[3]

But exemplary damages are not recoverable for carrying a passenger past destination, in the absence of willfulness or other conduct aggravating the wrong;[4] as where the conductor, confused by unusual occurrences, passes a station, and, courteously explaining to a passenger for this place, gives him a free return ticket.[5] So the refusal of a conductor to stop a train at

[2] Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967.

[3] Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 9 South. 375. Where the refusal of employés in charge of a steamboat to put a passenger off at destination is willful, or the result of gross and intentional negligence, or if their conduct in refusing to do so is in any way insulting towards the passenger, the owner of the boat is liable in punitive damages. Memphis & C. P. Co. v. Nagel (Ky.) 29 S. W. 743.

[4] Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36; Kansas City, M. & B. R. Co. v. Fite, 67 Miss. 373, 7 South. 223; Vicksburg & M. R. Co. v. Scanlan, 63 Miss. 413.

[5] Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456. Exemplary damages cannot be recovered against a railroad company for carrying a passenger past her destination, and in inducing her to alight, under a promise of a conveyance back, where the conductor expressed his regrets at his failure to stop at the proper station, and honestly endeavored to fulfill his promise to procure a conveyance. No malice, fraud, or oppressive conduct appears. Kentucky Cent. Ry. Co. v. Biddle (Ky.) 34 S. W. 904. Exemplary damages are not recoverable for negligence in carrying a passenger some two or three hundred

a station at which it is not scheduled to stop is not a malicious, willful, or wanton act, so as to entitle the passenger to exemplary damages for a personal injury sustained in jumping from the moving train, though he was misled into taking the train by the statements of the station agent.[6]

§ 552. EJECTION.

Exemplary damages may be awarded for the wrongful expulsion of a passenger from a train, if done maliciously or wantonly.[1] Thus it has been held that such damages are recoverable, where the conductor uses profane and threatening language to a female passenger, and sends a brakeman, who takes her little girl, and thereby compels her to follow and leave the train;[2] and also where a conductor, without demanding fare, or after the fare is offered to be paid, takes by the collar

yards past her destination, where the conductor was guilty of no insulting words or conduct in putting the passenger off. Louisville & N. R. Co. v. Jackson (Ky.) 36 S. W. 173.

[6] St. Louis, I. M. & S. Ry. Co. v. Atchison, 47 Ark. 74, 14 S. W. 468.

§ 552. [1] Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155. Punitive damages may be awarded for wrongful ejection, where it is accompanied with such violent and insulting conduct on the part of the trainmen as indicates a wanton disregard of the passenger's safety. St. Louis, I. M. & S. Ry. Co. v. Davis, 56 Ark. 51, 19 S. W. 107. The jury may award exemplary damages, if, in expelling plaintiff, defendant was guilty of oppression, fraud, or violence, actual or presumed. Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112. To entitle a passenger to exemplary damages for his wrongful expulsion from a train, there must be evidence of undue force, unnecessary rudeness, or insult, malice, or some willful wrong, accompanying his ejection. Tomlinson v. Railroad Co., 107 N. C. 327, 12 S. E. 138.

[2] Hicks v. Railroad Co., 68 Mo. 329.

a passenger who is properly behaving himself, and leads him to the door of the car at a station, and puts him off, tearing his coat in the act of expulsion, the act being unprovoked, willful, and malicious, and performed in a rude and aggravating manner, with the intention to wound the feelings of the passenger, and to bring him into contempt and disgrace.[3] So, exemplary

[3] Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126. Where a passenger with paralyzed hands requests the conductor to take his ticket from his pocket, and the conductor merely pretends to do so, or performs the act in so grossly negligent a manner as to indicate a wanton and wicked purpose to disregard the rights of the passenger, or to willfully inflict on him an injury, the company would be liable in exemplary damages for the ejection of the passenger. In any other event, if the company be liable at all, being itself free from fault, the damages would only be compensatory. Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128, 152. If there is any case where it is clear that exemplary damages may be given, it is where a passenger, who is lawfully entitled to stay and ride on a railway train, is put off at a flag station, in the middle of the night, in the midst of a wintry storm, a distance of 80 miles from his point of starting, and of 250 miles from the point to which he is entitled to ride on the train, though no insulting language or unlawful means are employed in effecting the ejection. There is no difficulty about permitting a jury to say whether the fact of expelling a passenger under such circumstances is wanton, reckless, or oppressive. Evans v. Railway Co., 11 Mo. App. 463. A passenger, unable to procure a ticket at a station, who refuses to pay the higher train fare, may recover exemplary damages for the conductor's refusal to permit him to get off the train a mile from his starting point, and for carrying him on to the next station, five miles distant, where he could obtain no shelter at that hour, and the weather was inclement. Hall v. Railway Co., 28 S. C. 261, 5 S. E. 623. Exemplary damages may be recovered for the wrongful and forcible ejection of a passenger, in a cold night, on the open prairie, with no human habitation in sight, where the conductor was guilty of gross negligence in examining the passenger's ticket. Atchison, T. & S. F. R. Co. v. Long (Kan. App.) 47 Pac. 993.

damages may be recovered against a railroad company for a violent assault on a passenger by a conductor.[4] So they may be recovered for personal injuries sustained in being forced from a moving train, if the conductor acted in a spirit of oppressive malice, or if his acts were such as to indicate a heedless disregard of consequences.[5]

But the mere fact that an expulsion of a passenger from a train may have been wrongful and injurious does not justify exemplary damages, in the absence of actual malice or wanton indifference as to the rights invaded.[6] So the mere fact that one is forcibly and

[4] Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560.

[5] Citizens' St. R. Co. of Indianapolis v. Willoeby, 134 Ind. 563, 33 N. E. 627; St. Clair v. Railway Co., 29 Mo. App. 76. But a person who is expelled from a railroad train at a regular station for failing to exhibit a ticket as required by the rules of the company, and who jumps on again as the train starts, cannot recover exemplary damages for his expulsion while the train is in motion, but his recovery must be limited strictly to compensation. Chicago, B. & Q. R. Co. v. Boger, 1 Ill. App. 472. A newsboy, who had paid no fare, was standing on the lower step of a street car, which was approaching a crossing where there were passengers who wished to enter the car. The conductor pushed the boy on the arm, and he fell from the car and was injured; but there had been no previous ill-will on the part of the conductor towards the boy, nor an unkind word spoken. Held, that there was no evidence that the conductor's act was wanton or malicious, or that he was moved by any feelings of violence, outrage, or reckless indifference of the consequences, and hence exemplary damages could not be recovered. Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816.

[6] Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. 312; Forsee v. Railroad Co., 63 Miss. 66. Punitive damages are not recoverable for compelling a male passenger to leave the ladies' car, where no unnecessary force is used, and no rude or insulting words are spoken, though the car to which the passenger was removed was not so com-

deliberately ejected from a car does not necessarily imply that it was done wantonly and maliciously, or with a bad motive, although the act may be in itself unlawful. Conceding that a passenger is wrongfully ejected from a train, the fact that it was forcibly and deliberately done is not the test by which the plaintiff's right to recover punitive damages is to be determined. On the contrary, before resorting to so extreme a measure, it is but proper that the conductor should act deliberately, and not harshly or inconsiderately.[7] Thus where a conductor, acting in what he believes to be the performance of his duty to the company, removes a passenger who refuses to pay fare or to produce a ticket, the company is liable only in compensatory damages, though the removal is unlawful.[8] So where a return coupon is canceled through a conductor's mistake, and

fortable as the one he was compelled to leave. Holmes v. Railroad Co., 94 N. C. 318. Exemplary damages are not recoverable for putting a passenger off at a place not a station, without violence or circumstances of aggravation. Toledo, P. & W. R. Co. v. Patterson, 63 Ill. 304.

[7] Philadelphia, W. & B. R. Co. v. Hoeflich, 62 Md. 300; Curl v. Railway Co., 63 Iowa, 417, 16 N. W. 69, and 19 N. W. 308. But in Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344, it was held that, for ejecting a passenger for refusal to pay fare in excess of the rate fixed by statute, exemplary damages may be recovered, if the expulsion was deliberately and forcibly done.

[8] Townsend v. Railroad Co., 56 N. Y. 295; Hamilton v. Railroad Co., 53 N. Y. 25, reversing 35 N. Y. Super. Ct. 118; Pittsburgh, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 157; Quigley v. Railroad Co., 11 Nev. 350; Claybrook v. Railway Co., 19 Mo. App. 432; Logan v. Railroad Co., 77 Mo. 663; Louisville, N. & G. S. R. Co. v. Guinan, 11 Lea (Tenn.) 98; Serwe v. Railroad Co., 48 Minn. 78, 50 N. W. 1021; Pine v. Railway Co., 50 Minn. 144, 52 N. W. 392.

his attempted rectification of the error is not a compliance with the rules of the company, another conductor who rejects the coupon when tendered in payment of fare, and who ejects the passenger for nonpayment thereof, cannot be said to act wantonly or maliciously, so as to authorize the recovery of punitive damages.[9] But in Indiana it has been held that the wrongful ejection of a passenger at about 1 o'clock at night, in the winter season, at a distance from any station or lodging house, authorizes the recovery of exemplary damages, though the conductor acted under a mistaken belief that the passenger had not paid his fare.[10] So, exemplary damages have been held recoverable for the ejection of a passenger from a train, where the conductor charged him with impersonating the purchaser of a nontransferable mileage ticket, and arbitrarily refused the passenger permission to identify himself.[11]

[9] Philadelphia, W. & B. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97. Exemplary damages cannot be recovered for the ejection of a passenger between stations without insult or unnecessary force, where the conductor acted under the mistaken belief that the passenger's ticket entitled him to ride only to the station just passed, and where, on discovering his mistake, he made arrangements to take the passenger to his destination. Norfolk & W. R. Co. v. Neely, 91 Va. 539, 22 S. E. 367.

[10] Louisville, N. A. & C. Ry. Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116.

[11] Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. 757. Where a passenger informs the conductor that he has already paid his fare, and his statement is corroborated by other passengers, an honest belief by the conductor that the fare has not been paid does not justify the forcible ejection of the passenger, nor the application of such epithets as liar, scoundrel, or fraud; and the passenger may recover

§ 553. RUDE AND INSULTING TONE.

A railway company cannot be held liable to answer in exemplary damages because its servant, who is required to collect fares, and protect it against imposition by expelling those who have not paid in the time that elapses between stations that are often but a short distance apart, informs a husband in a brusque manner, in the presence of his wife, whose head is resting on a pillow, that they must pay or get off, and, after waiting till the train reaches the next station, says, in a decided or rude tone, that they must get off. The railroad company cannot be held responsible for his failure, in the hurry of the moment, to modulate his voice, so as to make it soft or gentle, especially when he was giving a command in the line of his duty, which the plaintiffs had shown themselves loath to obey.[1] So mere brusqueness in the words or manner of a conductor in declining to stop the train between stations, to accommodate a passenger who was unable to get off at his destination, is not an insult which justifies the infliction of punitive damages against the company.[2] So, where a female passenger is carried past her destination, and is put off a mile beyond, exemplary damages cannot be recovered on the ground merely that the train hands were guilty of "indecorous" conduct towards her in putting her off, since "indecorous" means

exemplary damages against the conductor. Dalton v. Beers, 38 Conn. 529.

§ 553. 1 Rose v. Railroad Co., 106 N. C. 168, 11 S. E. 526.

2 Mississippi & T. R. Co. v. Gill, 66 Miss. 39, 5 South. 393.

impolite, or a violation of good manners or proper breeding;[3] but the company is so liable if the train hands were "insulting in tone" towards her,—that is, if their voices were so accented, inflected, or modulated as to express intentional insult.[4]

The mere threat to eject a passenger unless he pays the train fare is not such wantonness or malice as will entitle the passenger to recover exemplary damages.[5] And in a suit by a child for ejecting him from a train, the fact that the conductor may have used improper language to the mother of the child at the time of the expulsion will not authorize the recovery of exemplary damages.[6]

§ 554. STATUTORY PROVISIONS.

The Georgia Code [1] provides that where there are aggravating circumstances, either in the act or in the intention, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of plaintiff. Under this statute, exemplary damages may be awarded for the conductor's act in calling a passenger insulting names and striking him with a lantern; [2] and also

[3] Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530.

[4] Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429. In an action for the ejection of a passenger, punitive damages may be recovered if there is rudeness in accomplishing it. Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7. These two cases would seem to carry the doctrine of exemplary damages to the limit.

[5] Paine v. Railroad Co., 45 Iowa, 569.

[6] Pittsburgh, C. & St. L. R. Co. v. Dewin, 86 Ill. 296.

§ 554. [1] Section 3066.

[2] Western & A. R. R. v. Turner, 72 Ga. 292.

for the wrongful ejection of a passenger in the presence of fellow passengers, though the conductor acts in good faith, and uses no force.[3] So, for ejecting a passenger rightfully on a car, exemplary damages are recoverable where the conductor used insulting language, and was "very impolite and gruff." [4] And a passenger emaciated by disease, who is ejected from a train at a place not a station or a stopping place, without being given an opportunity to produce his ticket or pay his fare, may recover exemplary damages for the expulsion.[5]

But, under the Colorado statute,[6] exemplary damages cannot be recovered for the ejection of a passenger, where the conductor acts under a misconception of his rights, and uses no more force than is necessary to accomplish the result.[7]

[3] Georgia R. R. v. Homer, 73 Ga. 251; City & S. Ry. v. Brauss, 70 Ga. 368.

[4] Atlanta Consol. St. Ry. Co. v. Keeny (Ga.) 25 S. E. 629.

[5] Western & A. R. Co. v. Ledbetter (Ga.) 25 S. E. 663.

[6] Mills' Ann. St. Colo. § 1512, authorizes the recovery of exemplary damages when the injury complained of has been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings.

[7] Denver Tramway Co. v. Cloud, 6 Colo. App. 445, 40 Pac. 779.

CHAPTER XXXVIII.

EXCESSIVE AND INADEQUATE DAMAGES.

§ 555. Power of Courts over Excessive Verdicts.
556. Personal Injuries.
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558. Same—Hernia.
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561. Same—Loss of Limb.
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563. Same—Female Troubles.
564. Same—Loss of Society, Services, etc.
565. Assault, Insult, and Arrest.
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569. Ejection.
570. Same—Personal Injuries.
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572. Same—At Place Other Than a Station.
573. Compelling Payment of Two Fares.
574. Practice—Remittitur.
575. Inadequate Damages.

§ 555. POWER OF COURTS OVER EXCESSIVE VERDICTS.

Trial courts, and in most of the states appellate courts, possess the power of setting aside verdicts, in cases where there is no fixed rule of legal compensation, on the ground that the damages awarded are so excessive as to show that juries were influenced by passion, prejudice, or partiality.

It is within the province of the jury to assess the amount of damages in cases where there is no fixed legal rule of compensation; and the courts cannot interfere on the ground that the verdict is excessive, unless it is so disproportionate to the injuries alleged and proved as to indicate that it was the result of passion, prejudice, or partiality.[1] In such cases, the question to be considered is not whether the court, if acting in the place of the jury, would have given more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that it has acted under the impulse of some undue motive, or some gross error or misconception of the subject.[2] But where a verdict for compensatory or punitive damages, or both, is for so large an amount that it can be accounted for only upon the theory that it is the result of an improper sympathy or an unreasonable prejudice, it should be set aside.[3] "It is not the duty of courts to enforce the arbitrary edicts of juries, but it is their duty to firmly and fearlessly stand between the party and the jury, whenever it is manifest that the party has been made a victim to their

§ 555. [1] Morgan v. Southern Pac. Co., 95 Cal. 501, 30 Pac. 601; Chicago, R. I. & P. R. Co. v. Otto, 52 Ill. 416; Ohio & M. Ry. Co. v. Judy, 120 Ind. 397, 22 N. E. 252; Graham v. Railroad Co., 66 Mo. 536; Hempenstall v. Railroad Co., 82 Hun, 285, 31 N. Y. Supp. 479; Rowe v. Railroad Co., 82 Hun, 153, 31 N. Y. Supp. 304; Brooklyn St. R. Co. v. Kelley, 6 Ohio Cir. Ct. R. 155; International & G. N. R. Co. v. Stewart, 57 Tex. 166; Bass v. Railway Co., 39 Wis. 636.

[2] Norfolk & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811.

[3] Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357; Belknap v. Railroad, 49 N. H. 358.

prejudice." [4] So it has been written that "in the administration of justice, the same protection must be extended to corporations as to natural persons. All suitors are equal before the law. A court should hesitate as little to set aside an excessive verdict when it is against a corporation as when it is in favor of a corporation. Wild and extravagant recoveries for injuries that in themselves and in their consequences are moderate are not to be upheld against anybody, or in favor of anybody. In this state the judges are sworn to administer justice without respect to persons, and to do equal justice to the poor and to the rich." [5]

The jury cannot, however, be required to itemize the damages allowed, stating how much is for mental suffering, how much for physical suffering, and so on; and in determining whether damages are excessive only the gross sum will be considered.[6]

The courts of last resort in a few of the states have not the power to interfere with a verdict because the

[4] Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460.

[5] Bleckley, J., in Goins v. Railroad Co., 59 Ga. 426. In awarding damages for personal injury, the best criterion is the average amount awarded for injuries of a like nature and extent; and, where the verdict largely exceeds this average, it will be set aside. Lockwood v. Railway Co., 15 Daly, 374, 7 N. Y. Supp. 663.

[6] Ohio & M. Ry. Co. v. July, 120 Ind. 397, 22 N. E. 252. In some states a statutory limit is placed on the number of new trials that can be granted. But though the court has set aside two verdicts—one for $8,000, and the other for $10,000—on the sole ground that they were excessive, and because plaintiff refused to consent to a remittitur to $5,000, yet on the third trial it cannot refuse to instruct the jury that it is the sole judge of the amount of damages to be assessed under the evidence. The court has no power by instructions to limit the jury to the amount of former verdicts, or to an amount it may deem ade-

damages awarded are excessive. This is true of the court of appeals of New York,[7] and of the supreme courts of Illinois,[8] Oregon,[9] and Pennsylvania.[10] So, on writ of error, it is not within the province of the supreme court of the United States to determine whether a verdict is excessive.[11]

In all the states trial courts possess a wide discretion with respect to setting aside verdicts on the ground of excessive damages, and the granting of a new trial on this ground will not be reversed unless it appears to the appellate court that this discretion has been abused.[12]

quate, and a third verdict for $15,000 cannot be set aside as excessive under the statute. Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 11 South. 101.

[7] Maher v. Railroad Co., 67 N. Y. 52, affirming 39 N. Y. Super. Ct. 155; Gale v. Railroad Co., 76 N. Y. 594.

[8] The question whether damages are excessive cannot be raised in the supreme court of Illinois, since it necessarily involves questions of fact, which the statute has withdrawn from its appellate jurisdiction. North Chicago St. R. Co. v. Eldridge, 151 Ill. 542, 38 N. E. 246.

[9] Nelson v. Navigation Co., 13 Or. 141, 9 Pac. 321; Kumli v. Southern Pac. Co., 21 Or. 505, 28 Pac. 634.

[10] "The supreme court of Pennsylvania has no power to set aside a verdict as excessive. The power to do so is exclusively in the court below, and its refusal to exercise the discretion with which it is invested is not the subject of review." Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142. To same effect, see Pennsylvania R. Co. v. Fuller, 3 Penny. (Pa.) 176.

[11] New York, L. E. & W. R. Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356.

[12] Hardenbergh v. Railroad Co., 41 Minn. 200, 42 N. W. 933. A motion to set aside a verdict on the ground of excessiveness of damages awarded is addressed to the sound discretion of the court. Such discretion should, however, only be exercised in favor of the motion when the jury have gone beyond the proper exercise of their function.

§ 556. PERSONAL INJURIES.

The following verdicts have been held not excessive, under the rules laid down in the foregoing section: £16,000 for injuries to a physician earning £5,000 per annum before the accident, who was disabled by the accident from practicing his profession for two years before the trial, with a probability that he would be debarred from practice for two years more.[1] $25,000 for injuries to an eight year old child caused by the derailment of a car, by which he was completely crippled, both eyes burned out, both ears burned off, his hands burned almost to a crisp; in short, whose mental and physical functions were almost completely destroyed, and who was deprived of everything that would make life either enjoyable or useful, with nothing left but the capacity to exist.[2] $15,000, where there is evidence that the internal ligaments of the shoulder joint are

The power of the jury in fixing the amount of damages to be awarded is circumscribed only by fairness and reason. If the amount awarded is so high as to appear unfair or unreasonable, due consideration having been given to all the circumstances of the case, or if it appears that the jury in fixing the amount were actuated by prejudice or undue influence, it is the duty of the court to interfere. In the absence of such unreasonableness or unfairness, or proof of prejudice or undue influence, the verdict should not be disturbed. Ryan v. Steamboat Co., 15 Daly, 520, 8 N. Y. Supp. 471.

§ 556. [1] Phillips v. Railway Co. (1879) 5 C. P. Div. 280. This is one of the largest personal injury verdicts ever returned.

[2] Dunn v. Railway Co., 35 Minn. 73, 27 N. W. 448. A verdict of $25,000 for personal injuries to a strong, robust man, 28 years old, earning at the time of his injury, as traveling salesman, $3,000 per year and expenses, is not excessive; he having at the time of the trial, three years after his injury, not recovered so as to be able to

ruptured; that plaintiff has suffered great pain ever since the accident,—a period of two years; that she has been rendered unable to earn her livelihood; and that the injuries are permanent, though no bones were broken, and though there is conflicting evidence as to the extent of her injuries.[3] $10,000 for injuries to a healthy man, 25 years old, who by reason thereof has become crippled, and rendered unable to sleep well, whose urinary and sexual powers are impaired, and who is threatened with paralysis of the lower limbs.[4] $8,000 for injuries which transformed plaintiff from a strong, healthy man into a physical wreck, partially paralyzed, and almost totally incapacitated for business.[5] $6,000 for injuries to a man 72 years old, which deprived him to a considerable extent of the power of speech and penmanship, which impaired to a considerable extent his power of locomotion and his capacity to sleep, and which caused continuous pain.[6] $5,246 for injuries to a healthy man 31 years old, and earning $2,500 per year, which have caused him great pain, and greatly impaired his ability to labor, and which will subject him to discomfort and pain, and render him less able to resist disease, in the future.[7] $5,000 for rup-

work, and there being evidence to warrant a finding that it would be several years before he would be sufficiently recovered to work, during which time he would suffer considerable pain, and be put to expense for doctors, as he had up to the trial. Dieffenbach v. Railroad Co., 5 App. Div. 91, 38 N. Y. Supp. 788.

3 Morgan v. Southern Pac. Co., 95 Cal. 501, 30 Pac. 601.

4 Missouri, K. & T. Ry. Co. v. Cook (Tex. Civ. App.) 33 S. W. 669

5 San Antonio & A. P. Ry. Co. v. Long (Tex. Civ. App.) 28 S. W. 214.

6 Illinois Cent. R. Co. v. Wheeler, 50 Ill. App. 205.

7 Southern Kan. Ry. Co. v. Walsh, 45 Kan. 653, 26 Pac. 45

ture of some of the membranes of the chest, producing emphysemia, an incurable disease, which renders respiration distressing and difficult under active exercise.[8] $3,600, where it appears that plaintiff was 57 years old; that he was rendered unconscious by the accident; that he suffered from concussion of the brain and of the spine, was bruised on the shoulder and chest, and cut in the head and face; that the injuries were painful, and confined him to his bed for four weeks; that he was unable to return to his work for 20 weeks after the accident; and that at the time of the trial, several years after the accident, he still suffered from his injuries.[9] $3,000 in favor of a boy whose leg was run over by a street car, producing a contused and lacerated wound, and a permanent injury, which will always compel plaintiff to walk with a limp, owing to the loss of nutritive tissue.[10] But the following verdicts have been set aside as excessive: $25,000, though plaintiff has been crippled for life, has suffered pain and anguish, and

[8] Texas & P. Ry. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034. $5,000 is not excessive for injuries to a woman 57 years old, who has been deprived permanently of the use of her left arm, has had her power of locomotion affected, has had one of the bones of her shoulder broken, and her spine so injured as to cause her great pain, whose general health has been rendered bad, and whose system has been placed in such a condition as to be more liable to disease. Texas Pac. Ry. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636. $5,000 is not an excessive verdict for being kicked in the groin, compelling plaintiff to undergo a painful operation at a hospital, where he remained for six weeks, suffering more or less pain, which pain is liable to continue in the future. Niendorff v. Railway Co., 4 App. Div. 46, 38 N. Y. Supp. 690.

[9] Paetzig v. Railroad Co., 12 Misc. Rep. 573, 33 N. Y. Supp. 854.

[10] Buck v. Power Co., 108 Mo. 179, 18 S. W. 1090.

been involved in large expenditures, where the injuries are the result purely of negligence, and have not been inflicted willfully or wantonly.[11] $10,000, where the evidence shows that plaintiff, a teacher in a public school, was cut in the forehead and bruised on the body and limbs, by which she was confined to her bed for two weeks; that she had not recovered at the trial from an irritation and congestion developed from the injury; that she suffered more when making mental efforts, and that after school she was exhausted, and had to go home and lie down; that she slept but little, day or night; that she was absent from work four months, but lost little in salary or money.[12] $9,000 for injuries to an eye, struck by a piece of glass from a broken window, where it appears that five weeks after the accident plaintiff resumed his ordinary duties, and continued therein without inconvenience, though there is a possibility, but not a probability, that inflammation may some time set in and entirely destroy the eye.[13] $7,000 for injuries to the knee of a carpenter, 36 years old, and earning $1,000 per annum, who expended $300 for medical services, and suffered great pain, who was unable to work at the time of the trial, 11 months after the accident, and who could walk at the trial only with the assistance of a cane, where the evidence is conflicting as to whether or not his leg would ever get well, though externally the injury appeared to have been practical-

11 Chicago & N. W. Ry. Co. v. Fillmore, 57 Ill. 265.

12 Smith v. Railroad Co. (Sup.) 41 N. Y. Supp. 977.

13 Jewell v. Railway Co., 16 Phila. (Pa.) 64. The verdict was reduced to $4,000.

ly cured.[14] $4,300, where the injuries to a boy 17 years old caused him considerable pain for several months, and diminished his earning capacity $6 per week, but from which it is probable that he will entirely recover in three or four years.[15] $2,000 for injury to the ligament of the third finger of the right hand, causing a slight deformity, and some loss of power to the hand, accompanied with some bruises, and for a lung trouble, from which plaintiff recovered in a month.[16]

§ 557. SAME—BRUISES, CONTUSIONS, AND MUSCULAR INJURIES.

A verdict of $1,000 is not excessive for being knocked down by a car, inflicting severe contusions and bruises on the hip and lower part of the back, causing much pain and a traumatic fever, and necessitating the employment of a physician for several months.[1] Nor is a verdict of $3,000 excessive where it appears that plaintiff became unconscious after the accident, and remained so for hours; that she sustained a severe bruise on her leg, of such a character as to cause sloughing down to the muscles; that grafting skin from other parts of the body was necessary to heal the wound; that plaintiff was in bed for two weeks, and confined to the

[14] Cogswell v. Railway Co., 5 Wash. 46, 31 Pac. 411. Verdict reduced to $5,000.

[15] Levitt v. Railroad Co. (Sup.) 43 N. Y. Supp. 426.

[16] Union Pac. Ry. Co. v. Hand, 7 Kan. 380.

§ 557. [1] O'Toole v. Railroad Co., 58 Hun, 609, 12 N. Y. Supp. 347, affirmed 128 N. Y. 597, 28 N. E. 251.

house for five weeks; and that she was lame for 10 months.[2]

But a verdict of $2,500 for injuries sustained by stepping into a hole in a station platform is excessive, where it appears that the leg was merely bruised, and the skin broken a little; that at the time of the trial, three years after the accident, plaintiff was able to walk naturally and gracefully, though she testified that she had not fully recovered; and that poor health at the time of the injury prevented as speedy a recovery as might otherwise have been expected.[3] For a merely muscular injury, a verdict of $5,000 is excessive, though plaintiff was confined to his bed nearly all the time for about a month, and is still somewhat lame at the trial.[4] A verdict of $750 for a mere contusion on a leg, not resulting in any permanent injury, and not necessitating even a suspension of plaintiff's work, or the calling in of medical attendance, will be reduced to $300.[5] So, $1,000 is excessive as compensatory damages for a fall from a street car, causing bruises and sickness, and disabling plaintiff from work for three months, but not causing any permanent injury.[6]

2 Demond v. Railroad Co., 8 Misc. Rep. 610, 29 N. Y. Supp. 318.

3 Chicago, R. I. & P. R. Co. v. Payzant, 87 Ill. 125.

4 Chicago, R. I. & P. R. Co. v. McAra, 52 Ill. 296.

5 Maher v. Railway Co., 40 La. Ann. 64, 3 South. 462.

6 Conway v. Railroad Co., 46 La. Ann. 1429, 16 South. 362. Verdict was reduced to $500.

§ 558. SAME—HERNIA.

A verdict of $5,000 for an incurable hernia that may at any moment become strangulated, and produce death, is not excessive.[1] Nor is $7,000 excessive for the rupture of a man 58 years old, who was engaged in a business that required some lifting, and who for six years before the accident had earned $300 per month, and who has earned nothing since, though some of the experts testified that the rupture would not shorten plaintiff's life.[2]

§ 559. SAME—SPRAINS AND DISLOCATIONS.

A verdict of $2,000 for a sprained ankle is not excessive, where the ligaments are also ruptured, and the injury will probably be permanent.[1] Nor is $1,500 excessive for dislocation of the shoulder, injury to the spine, and bruises on knee and hip.[2] Nor is $3,000 excessive for injury to plaintiff's ankle, confining her to her bed for three weeks, necessitating the use of crutches for five months, and producing permanent stiffness of the joint.[3] But a verdict of $2,500 for a sprained

§ 558. [1] Illinois Cent. R. Co. v. Simmons, 38 Ill. 242.

[2] Wedekind v. Southern Pac. Co., 20 Nev. 292, 21 Pac. 682.

§ 559. [1] Dimmitt v. Railroad Co., 40 Mo. App. 654. $2,250 will not be set aside as excessive for injuries to the right hand, permanently stiffening and crippling it. Honeycutt v. Railway Co., Id. 674. A verdict of $1,650 for a sprained ankle, which remained permanently weak, thus affecting seriously plaintiff's working capacity, is not excessive. Chesapeake & O. Ry. Co. v. Friel (Ky.) 39 S. W. 704.

[2] Patten v. Railway Co., 36 Wis. 413.

[3] St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887.

ankle is excessive, where it appears that plaintiff was prevented from attending to business for only two weeks, though for two or three weeks thereafter he used crutches, and where his attending surgeon thinks that he will entirely recover from the effects of the sprain, and where his salary is $1,100 per annum, and the physician's bill $25.[4]

§ 560. SAME—BROKEN BONES.

The following verdicts have been sustained by the courts as not excessive: $9,000 for a leg broken in two places, confining plaintiff, formerly a strong, healthy man, to bed for three months, and permanently crippling him.[1] $7,000 for the fracture of the thigh bone in two places, disabling plaintiff from walking for six or eight months, and permanently injuring him.[2] $5,000 for the fracture of the thigh bone, followed by permanent after-effects.[3] The same sum for several bro-

[4] Spicer v. Railway Co., 29 Wis. 580.

§ 560. [1] Griffith v. Railway Co., 98 Mo. 168, 11 S. W. 559. A verdict for $9,000 will not be set aside as excessive where plaintiff's hand was cut, and one of his legs broken so that a bone protruded through his clothing and his boot, necessarily confining him to a house near the place of accident for six months, and crippling him for life. Farish v. Reigle, 11 Grat. (Va.) 697.

[2] Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86. A verdict for $7,000 is not excessive for the fracture of the neck of the femur, causing intense pain, where the injured person, a woman 63 years old, will never recover the full use of the leg, which has been permanently shortened, and will never be free from pain. Fitch v. Railroad Co. (Super. N. Y.) 10 N. Y. Supp. 225.

[3] O'Connell v. Railway Co., 106 Mo. 482, 17 S. W. 494. Such a verdict for such an injury will not be set aside as excessive though

ken ribs, hip contused, nose broken and disfigured, a permanent case of catarrh superinduced, and sense of smell impaired.[4] $4,000 for a fracture of that portion of the pelvis called the "ilium," causing severe pain for months, from which injury plaintiff had not recovered at the time of the trial, more than three years after the accident.[5] $2,000 for a broken forearm, resulting in the permanent displacement of the radius, and preventing plaintiff from doing any work except a little sewing.[6]

But $9,000 for injuries to a man 51 years old, whose earning capacity had been $600 per annum, is excessive, though several of his ribs were broken, and the

plaintiff is 70 years old. Hinton v. Railroad Co., 65 Wis. 323, 27 N. W. 147. A verdict of $5,000 is not excessive for the breaking of some ribs, and of a leg in two places, resulting in the shortening of the leg and a curvature of the spine. Mexican Cent. Ry. Co. v. Mitten (Tex. Civ. App.) 36 S. W. 282.

[4] Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597. $5,000 is not excessive, where plaintiff, about 54 years old, had three ribs fractured, received a crushing wound in the lower part of the leg, and was also injured above the knee, was confined to his bed for six or seven weeks, suffering great pain and difficulty in breathing, and was lame for nine months after the accident, and may continue so for years. Quinn v. Railroad Co., 34 Hun (N. Y.) 331.

[5] Heucke v. Railway Co., 69 Wis. 401, 34 N. W. 243.

[6] Wheaton v. Railroad Co., 36 Cal. 590. A similar verdict for a broken arm was sustained in New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210. $1,000 was awarded a farm laborer for a broken leg, causing partial, slight disability. Behrens v. The Furnessia, 35 Fed. 798. $350 is not excessive for a broken leg, confining plaintiff to a hospital for eight weeks, causing pain, and preventing plaintiff from working at his trade as a tailor for a year after the injury. Schapiener v. Railroad Co. (City Ct. N. Y.) 14 N. Y. Supp. 921.

right collar bone was displaced, and the injuries were of a permanent character, incapacitating him from manual labor.[7] So $5,000 is excessive for a broken leg, rendered in favor of a man 67 years old.[8] So $4,000 is excessive for the fracture of the fibula, and the rupturing of some of the ligaments, where the fracture has united perfectly, but the ligaments have not healed entirely, and will trouble plaintiff in going up or down hill, or when there is a change of weather.[9]

§ 561. SAME—LOSS OF LIMB.

A verdict of $23,000 will not be disturbed where it appears that before the accident plaintiff was a healthy and robust woman in the prime of life; that the injury necessitated the amputation of one leg below the knee, the stump of which had never healed, and was easily inflamed; that her arm had an enlargement, which interfered with its reaching and full use; that her hearing was impaired; and that she suffered great pain.[1] Nor is $18,000 excessive for injuries resulting in the loss of a leg and the use of an arm to a man in the prime of life.[2] Nor is $12,000 for the loss of a leg below the knee of a five year old boy.[3] Nor will a verdict for $11,000 be set aside as excessive merely because

[7] Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714.

[8] North Chicago St. R. Co. v. Wiswell, 68 Ill. App. 443. Verdict reduced one-half.

[9] South Covington & C. St. Ry. Co. v. Ware, 84 Ky. 267, 1 S. W. 493.

§ 561. [1] Erickson v. Railway Co., 11 Misc. Rep. 662, 32 N. Y. Supp. 915.

[2] Murray v. Railroad Co. (City Ct. Brook.) 7 N. Y. Supp. 900.

[3] Akersloot v. Railroad Co. (Super. N. Y.) 15 N. Y. Supp. 864.

plaintiff is a man advanced in years, where the injuries he suffered were of the most severe character, entailing confinement to the house and to his bed for a long period, producing great suffering of body and anxiety of mind, necessitating expensive surgical treatment, besides ordinary attendance of physicians, and the amputation of a large portion of one of his feet.[4] Where a personal injury necessitates the amputation of a foot near the ankle, but so as to save the heel, and a running sore is on the stump at the time of the trial, more than a year and a half after the injury, a verdict awarding $10,000 to plaintiff, a carpenter, 45 years of age, and earning good wages before the accident, will not be set aside as excessive.[5] A verdict of $9,000 is not excessive for the loss of a leg below the knee, where plaintiff was 16 years old at the time, and was earning about $8 a week, and since the accident he has been able to earn very little.[6] Nor is $8,500 excessive where it appears that plaintiff lost several toes; that he suffered great pain, and was unable to get out of bed for 10 weeks without assistance; that he could not go about for 5 months, and then had to use crutches; that the accident disabled him from working more than three quarters of his time at his trade as bookbinder, at which he earned $15 per week; and that his lameness

[4] Jordan v. Railroad Co. (Com. Pl.) 9 N. Y. Supp. 506.

[5] Olson v. Railroad Co., 45 Minn. 538, 48 N. W. 445.

[6] Richmond v. Railroad Co., 76 Hun, 233, 27 N. Y. Supp. 780; Id., 65 Hun, 619, 19 N. Y. Supp. 597. $9,000 is not excessive for the loss of the foot of a farmer 40 years old, and earning about $500 per year. Georgia Railroad & Banking Co. v. Keating (Ga.) 25 S. E. 669.

is permanent.[7] Where a passenger's foot has been crushed between a ferryboat and its dock, necessitating the amputation of three toes, a verdict of $2,500 will not be set aside as excessive.[8]

But a verdict of $20,000 is excessive for breaking the bones of a leg and ankle, necessitating the amputation of the foot, though the leg did not heal up for a year, during which time plaintiff was unable to attend to business, and at times suffered intense pain, and has been rendered unfit for manual labor.[9] So a verdict for $11,000 is excessive for injuries necessitating the amputation of a toe and a portion of the foot, though plaintiff has become crippled for life, and was ill for

[7] Commerford v. Railroad Co., 8 Misc. Rep. 599, 29 N. Y. Supp. 391. Besides breaking the bones of his left foot, plaintiff suffered the loss of a part of his right foot, which was amputated at the instep. When injured he was 23 years old, earning $65 per month. He was prevented from pursuing any occupation for upward of 14 months, during which time he experienced much pain. He was permanently disabled from engaging in any pursuit requiring him to stand any considerable length of time. Held, that a verdict of $6,500 was not excessive. Elliott v. Railway Co., 18 R. I. 707, 28 Atl. 338, and 31 Atl. 694. A verdict of $3,000 is not excessive for injuries to a passenger by a fall from a car, causing a permanent depression of the skull, and an enlargement of the knee joint, depriving her of the free use of her leg. Montgomery v. Railroad Co., 53 Hun, 633, 6 N. Y. Supp. 178.

[8] New Jersey R. Co. v. Palmer, 33 N. J. Law, 90.

[9] Kennon v. Gilmer, 9 Mont. 108, 22 Pac. 448. Plaintiff required to consent to a reduction to $10,750. A verdict for $20,000 is excessive for injuries resulting in the loss of both feet of a man 36 years old, and earning $8 per week. Reduced to $15,000. Pfeffer v. Railway Co., 4 Misc. Rep. 465, 24 N. Y. Supp 490, affirmed 144 N. Y. 636, 39 N. E. 494.

three months.[10] And so is $9,000 for the loss of a leg, where it appears that plaintiff was a mason tender, earning $2 a day when at work.[11]

§ 562. SAME—INJURIES TO SPINE AND NERVOUS SYSTEM.

The following verdicts have been sustained against objections that they were excessive: $30,000 for a concussion of the spine, the result of which has been chronic inflammation of the membranes which envelop the spinal cord, which is a progressive disease, impairing the faculties, both physical and mental, and which will probably cause death.[1] $20,000 for injuries to the spinal cord, producing paresis and kidney disorders, in a young man engaged in an extensive and lucrative business.[2] $15,000, where plaintiff at the time of the accident was a strong, healthy woman, 30 years old, and, in addition to looking after her household duties, had been earning $50 per month, and by reason of paralysis caused by the accident has lost the use of her lower limbs, and will be a helpless invalid during the remainder of her life.[3] $12,000 for injuries to the spine, disorder of bowels and urinary organs, partial paralysis, shrinkage of one leg about an inch, 20 pounds loss of weight, weakness of nerves, eyesight, and hearing, and permanent and almost total disability to labor,

10 Collins v. Railroad Co., 12 Barb. (N. Y.) 492. Reduced to $5,000.

11 Morris v. Railroad Co., 68 Hun, 39, 22 N. Y. Supp. 666.

§ 562. 1 Harrold v. Railroad Co., 24 Hun (N. Y.) 184.

2 Walker v. Railway Co., 63 Barb. (N. Y.) 260.

3 Sears v. Railway Co., 6 Wash. 227, 33 Pac. 389, 1081.

where plaintiff was a young man, 21 years old, earning $1,150 per year at the time of the accident.[4] $10,000 for some internal hurt, manifesting itself in symptoms of hysteria, where the testimony of the attending physician, corroborated by that of another medical expert, is that plaintiff could not regain her health, and other evidence tended to show the serious nature of her injuries, even though physicians called by defendant testified that plaintiff ought to recover soon.[5] $8,800 for injuries to the spinal cord, resulting in an incurable disease, progressing slowly, and ultimately causing death, where plaintiff, before the accident, was a healthy man 58 years old, having steady employment, and earning $70 per month.[6] $7,500 for injuries to the spinal column and a fracture of the coccyx, causing insomnia and impairment of nervous system.[7] $7,000, where an unmarried woman, 35 years old, enjoying excellent health, strong and active, her physical condition unimpaired, receives injuries, causing her great pain, and rendering her unable to endure fatigue, or to take

[4] Richmond & D. R. Co. v. Allison, 89 Ga. 567, 16 S. E. 116.

[5] Southern Pac. Co. v. Rauh, 1 C. C. A. 416, 49 Fed. 696. A verdict of $10,000 is not excessive for a spinal difficulty, which will continue to increase in the future, deprive plaintiff of power over his limbs, and cause him to become bedridden. Dalzell v. Railroad Co., 53 Hun, 633, 6 N. Y. Supp. 167.

[6] Cooper v. Railway Co., 54 Minn. 379, 56 N. W. 42.

[7] Clark v. Railroad Co., 127 Mo. 197, 29 S. W. 1013. A verdict for $7,500 is not excessive for an injury in the spine, which, though slight at first, had grown worse, until plaintiff's nervous system was hopelessly impaired, and the functions of heart and lungs, as well as other organs, were seriously and permanently deranged, and sexual paralysis produced. San Antonio & A. P. Ry. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584.

active exercise, as she had been accustomed, and permanently impairing her nervous system.[8] $6,750, where it appears that before the accident plaintiff was a strong and vigorous young man, earning an annual salary of $1,800, and that in consequence of the accident he became a physical and mental wreck, and subject to epileptic fits.[9] $6,500 for injuries resulting in paralysis of one side of the body.[10] $5,000 for an injury received in a collision resulting in the breaking down of the nervous system, and incapacitating plaintiff, formerly a strong and healthy farm laborer, from all manual work.[11] $4,000, where, in addition to hurts that are painful, but only temporary in character, plaintiff has received a spinal injury, from which it is likely he will never recover.[12] $3,250, where plaintiff, who was 22 years old, and very strong, was so cut and bruised

[8] Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181.

[9] Gidionsen v. Railroad Co., 129 Mo. 392, 31 S. W. 800.

[10] Smith v. Railroad Co., 119 Mo. 246, 23 S. W. 784.

[11] Chicago, B. & Q. R. Co. v. Sullivan, 21 Ill. App. 580. A verdict of $5,000 is not excessive for injuries to the membranous covering of the spine, from which plaintiff will probably never fully recover. Pittsburg, C. & St. L. R. Co. v. Thompson, 56 Ill. 138. In an action for injuries sustained in a collision, it appeared that plaintiff was considerably cut and bruised, one of his wrists sprained, and the sciatic nerve of the right leg contused, causing much pain, and confining him to his room for four weeks. At the time of the trial, three months after the injury, he could not walk without the aid of a stick, and then only with great pain, and there was a probability that the injury to the leg would be permanent. He estimated the value of his services at $50 per week. Held, that a verdict for $5,000 should not be set aside as excessive. Kellow v. Railroad Co., 62 Hun, 620, 16 N. Y. Supp. 676.

[12] Missouri Pac. Ry. Co. v. Shuford, 72 Tex. 165, 10 S. W. 408.

on his right arm and wrist as to permanently impair the nerves supplying the fingers, depriving him of his strength in that hand, and causing pain for several years after the injury.[13] $1,500 for injuries to a 19 year old female, who was badly lacerated, whose system was shocked, who was prevented from earning any wages for two years after the accident, though she had previously earned $20 per month and board, and whose medical bills footed up to about $200.[14]

But, although the case is one for punitive damages, and plaintiff, in addition to serious external cuts and bruises, received a shock which greatly affected her entire nervous system, yet if it does not satisfactorily appear that the injuries are permanent, a verdict for $26,000 appears to a rational mind at first blush to be excessive, and must therefore be set aside.[15] So a verdict of $15,000 for injuries to plaintiff's spinal cord, causing her pain intermittently, and rendering her unable to walk, was deemed excessive in the case of a woman 53 years old.[16] So a verdict for $12,000 for injuries sustained in being ejected from a street car is excessive, where it appears that plaintiff got up immediately after he struck the ground, followed the car, and walked a considerable distance that evening, went to work as usual, continued in receipt of the same salary as before the accident, and that his injuries to the nervous system, if permanent, are not of a serious nature.[17] So

[13] Wilson v. Railroad Co., 8 Misc. Rep. 450, 28 N. Y. Supp. 781.
[14] Fowler v. Railroad Co., 59 Hun, 623, 13 N. Y. Supp. 453.
[15] Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747.
[16] Furnish v. Railway Co., 102 Mo. 438, 13 S. W. 1044.
[17] Chicago City Ry. Co. v. Henry, 62 Ill. 142.

$10,000 is an excessive verdict for external bruises and a great shock to the nervous system sustained by being thrown to the floor of a car in a collision, even though the case is one for punitive damages, where there is no evidence that the injuries will be permanent.[18]

§ 563. SAME—FEMALE TROUBLES.

A verdict of $10,000 is not excessive for injuries producing a miscarriage, and a long sickness consequent thereon, leaving plaintiff's constitution and nervous system much shattered and broken, and greatly impairing the action of her heart, and weakening her eyesight.[1] Nor is $6,933 excessive for injuries to a female passenger, who was for a time rendered unconscious, and whose ribs were broken, spine injured, and health impaired, and who thereafter suffered greatly from uterine troubles.[2] Nor is $4,000 excessive for permanent womb troubles, where plaintiff, before the accident, was a strong, healthy woman, with a florid com-

[18] Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357. A female passenger was thrown to the floor of a car by its derailment. She was rendered unconscious for some time, suffered great pain, and was confined to her bed most of the time for 13 months. Her spine and womb caused her great pain, and, on examination, physicians found a displacement and laceration of the womb, but they agreed that these were not caused by the fall or shock in the car. It did not satisfactorily appear that the injury to her spine was permanent. Held, that a verdict of $7,000 should be set aside as excessive. Abbott v. Tolliver, 71 Wis. 64, 36 N. W. 622.

§ 563. [1] Howland v. Railway Co., 110 Cal. 513, 42 Pac. 983.

[2] Houston & T. C. Ry. Co. v. Lee, 69 Tex. 556, 7 S. W. 324.

plexion, and afterwards pale and sickly.[3] But $20,000 is excessive for the displacement of a womb, and attendant difficulty, where it appears that the uterine difficulties were less troublesome at the time of the trial than immediately after the accident, and that, with care and proper treatment, they are probably curable, and that the other internal troubles will be relieved when the uterine displacement is cured.[4] So $10,000 is excessive verdict for an antiflection of the womb, produced partly by the accident and partly by antecedent causes, but which is not in an incurable condition.[5]

§ 564. SAME—LOSS OF SOCIETY, SERVICES, ETC.

In an action by a husband for loss of services, etc., of his wife, a verdict of $10,000 will not be set aside as excessive, where she was a strong, healthy woman, 38 years old, at the time of the accident, and since then has been, and always will be, a physical wreck, and can never be a wife to him again.[1] So, where a husband has expended over $800 in the necessary treatment and cure of his wife to the time of trial, and it appears that she is totally disabled from doing any household duty, or of being of any aid or assistance to plaintiff as a wife, a verdict of $5,000 for loss of society, etc., will not be

[3] Fitton v. Railroad Co. (City Ct. Brook.) 5 N. Y. Supp. 641, affirmed 127 N. Y. 650, 27 N. E. 856.

[4] Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. 860.

[5] Missouri, K. & T. Ry. Co. v. Turley (Indian T.) 37 S. W. 52.

§ 564. [1] Cannon v. Railroad Co., 14 Misc. Rep. 400, 35 N. Y. Supp. 1039.

set aside as excessive.[2] Nor is $3,000 excessive in an action by a husband for loss of society and services arising from injuries to his wife, consisting in the fracture of the scapula, which never united, but left her permanently disabled in her arm and shoulder, necessitating the wearing of an iron frame, and causing constant pain with any exertion.[3]

A verdict of $2,000 for loss of services of plaintiff's seven year old daughter, and for medical expenses, will not be disturbed as excessive, where it appears that it was necessary to amputate the left thumb of the child, and that plaintiff incurred a bill of $100 for medical treatment.[4] But in an action by a father for loss of services, expenses, etc., caused by injuries to a ten year old son, resulting in a loss of a leg and the toes of the other foot, a verdict of $4,500 is excessive, where the evidence shows that the boy's services would be worth $100 per annum until majority.[5]

§ 565. ASSAULT, INSULT, AND ARREST.

A verdict of $4,850 will not be set aside as excessive for a brakeman's acts in falsely charging a passenger with an attempt to evade payment of fare, accompanied by language coarse, profane, and brutal, entirely unprovoked, used to a highly respected citizen, a judge, in feeble health, and further accompanied by brandish-

[2] Furnish v. Railway Co., 102 Mo. 669, 15 S. W. 315.

[3] Allen v. Railroad Co., 60 N. Y. Super. Ct. 230, 17 N. Y. Supp. 187, affirmed in 137 N. Y. 561, 33 N. E. 338.

[4] Kitchell v. Railroad Co., 10 Misc. Rep. 277, 30 N. Y. Supp. 1079

[5] Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1.

ing his fists in the passenger's face, and the subsequent retention of the brakeman in the company's employ, though no blow was actually struck.[1] Nor is $3,000 excessive for an unjustifiable assault on a passenger by a brakeman, followed by his arrest and detention in a jail for 12 hours on a groundless charge of disorderly conduct.[2] Nor will a verdict of $1,000 be set aside as excessive for the act of a conductor in forcibly kissing a female passenger of respectability and culture.[3]

A verdict of $1,000 is not excessive for an unprovoked assault on a passenger by an intoxicated fellow passenger, who struck him several severe blows, with both fists, in the face and mouth, blacking his eyes, loosening his teeth, cutting his lips, injuring his nose, and rendering him unable to eat meat or to swallow food comfortably for 10 days.[4] Nor is $250 excessive for insulting and abusive language used by a drunken passenger to a female passenger, whose nerves were affected by the encounter to such an extent that she was made sick for a week.[5]

But a verdict of $4,500 for an assault on a passenger by a brakeman will be set aside as excessive, where the only physical injury was a slight laceration of the hand,

§ 565. [1] Goddard v. Railway, 57 Me. 227.

[2] Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 41 Pac. 952.

[3] Craker v. Railway Co., 36 Wis. 657. $1,000 is not excessive for an assault and battery committed on a passenger by a brakeman, accompanied with insulting language, though no loss of time resulted to plaintiff in his business, and though no considerable physical suffering was occasioned. Atlanta & W. P. R. Co. v. Condor, 75 Ga. 51.

[4] Hendricks v. Railroad Co., 44 N. Y. Super. Ct. 8.

[5] Lucy v. Railway Co., 64 Minn. 7, 65 N. W. 944.

and the only real damage was the mental suffering of plaintiff, the vexation and anxiety, and the sense of wrong and insult, produced by the brakeman's acts.[6]

§ 566. FAILURE OR REFUSAL TO ACCEPT AND CARRY PASSENGER.

The master of a vessel bound for San Francisco ascertained that a person who had gotten on board at a Mexican port had been banished from California by the vigilance committee of San Francisco, under a penalty of death in case of his return. To avoid bloodshed, the master put the passenger on a vessel bound for Mexico, which they encountered during the voyage. It was held by the United States supreme court, sitting on appeal in admiralty, that $4,000 for refusal to carry the passenger was excessive, and that the damages would be reduced to $50, in view of the fact that the master acted for the best interests of the passenger.[1] So $1,500 is excessive for failure to stop a train at a station, where there is a passenger waiting to board it, who is compelled to take the next train, four hours later, and who suffers no damages, except disappointment, delay, and inconvenience.[2] So a verdict of $1,000 for a polite refusal of a conductor to permit a lady passenger to ride on an excursion ticket is excessive, where she suffered no injuries in consequence, and was permitted to take the next train, and complete her journey on that tick-

[6] Bass v. Railway Co., 39 Wis. 636.

§ 566. [1] Pearson v. Duane, 4 Wall. 605.

[2] Memphis & C. R. Co. v. Green, 52 Miss. 779.

et.[3] So a verdict of $750 for preventing a colored person from boarding a street car is excessive, where it appears that, after waiting a few minutes, plaintiff was carried to her destination on another of defendant's cars.[4] So $200 is excessive for the failure of a train to stop at a station, by reason whereof a passenger, who had purchased a ticket, walked to his destination, eight miles away, without suffering any injurious consequences.[5] So $150 is excessive for failure to stop a train at a flag station on signal, and to take on an intending passenger, whose pecuniary loss by reason thereof did not exceed $2.50, and who suffered no great anxiety, vexation, and annoyance by reason thereof.[6]

§ 567. DENIAL OF ACCOMMODATIONS.

A verdict of $3,000 is excessive for ejecting from a sleeping car, without abusive language or personal violence, a passenger who has lost his sleeping-car ticket, and who furnishes the conductor with proof that he lost it, where he could have retained his berth by paying $1.50, and where he rode to his destination in a passenger car in the same train.[1] But a verdict of $75 to a passenger whose proper application for a seat not only provoked a refusal from the conductor, but sub-

[3] Goins v. Railroad Co., 59 Ga. 426.

[4] Turner v. Railroad Co., 34 Cal. 594.

[5] Gulf, C. & S. F. Ry. Co. v. Cleveland (Tex. Civ. App.) 33 S. W. 687.

[6] Gulf, C. & S. F. Ry. Co. v. Gaedecke (Tex. Civ. App.) 39 S. W. 312. Judgment reduced to $10.

§ 567. [1] Pullman Palace-Car Co. v. Reed, 75 Ill. 125.

jected the audacious passenger to an explosion of profane and contemptuous wrath from that official, is not excessive.[2] Nor is $200 excessive for excluding, in a rude manner, and in the presence of several persons, a colored woman from the ladies' car, in which she was entitled to ride.[3]

§ 568. CARRYING PAST DESTINATION.

In an early Mississippi case it was held that a verdict of $4,500 will not be set aside as excessive for carrying a passenger 400 yards beyond the station, and there compelling him to get off, though he sustained no pecuniary damages, and no force was used.[1] But this case has been practically overruled,[2] and such a verdict would probably not be permitted to stand at the present time by any court possessing the power to interfere with excessive verdicts. But recently the court of appeals of Kentucky upheld quite a large verdict. A female passenger was carried about a mile beyond her destination, and then compelled to get off, and walk several miles to her house over a rough and muddy route, and was ill for four days in consequence. When compelled to get off, no assistance was offered, and the train employés were "insulting in tone." It was held

[2] Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697. In this case, Woods, J., said: "That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God, and take courage."

[3] Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185.

§ 568. [1] New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660.

[2] New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607.

that a second verdict for $3,000 would not be set aside as excessive.[3] Nor is $1,000 excessive for putting a female passenger and her children off at a wrong station, where it appears that she was compelled to go on to her station, two miles distant, over muddy roads, in the dark, with strange men; that the wagon she had hired broke down, compelling her to walk the rest of the way; and that as a result a bronchial trouble, of which she was nearly cured, returned in a worse form than ever before.[4] So $500 is not an undue punishment of a railroad company for carrying a passenger three-quarters of a mile past his station, and then harshly refusing to back the train to the usual stopping place, so that he is compelled to get off in the dark and rain at a muddy place, and then walk back to the proper stopping place, or else to remain on the train.[5] So $218 is not excessive where there is evidence that plaintiff, by reason of the railway company's failure to stop at her destination, was carried by, and compelled to get off, and walk, in a delicate condition, and during a hot day, 400 yards, over a rough and rocky road.[6] Nor is $100 excessive for carrying a female passenger, with two infant children, about a quarter of a mile past the station, and then compelling her to walk back in the rain.[7]

But a verdict for $3,275 is excessive for carrying a sick passenger about 60 feet past the station platform, where he voluntarily got off, and was carried into the

[3] Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429.

[4] Texas & P. Ry. Co. v. Hartnett (Tex. Civ. App.) 34 S. W. 1057.

[5] Higgins v. Railroad Co., 64 Miss. 80, 8 South. 176.

[6] Louisville & N. R. Co. v. Guy (Ky.) 37 S. W. 1043.

[7] Alabama G. S. R. Co. v. Wilkinson, 77 Ga. 75.

station house in a chair furnished by the company, and with the assistance of its employés.[8] So a verdict of $2,000 for carrying a female passenger past her destination to the next station, one and one-half miles distant, is excessive, where she sustained no injury except to walk back on a pleasant day.[9] So $1,000 is excessive for carrying a female passenger past her destination, owing to the negligent failure to stop the train a reasonable length of time, where plaintiff was safely put off at the next station, and carried back without expense, and where defendant's servants were not guilty of any insult or oppression, but on the contrary were polite and considerate.[10] So a verdict of $750 is excessive for carrying a passenger to the station beyond his destination, and putting him off there, where he lost only two or three hours' time, and paid $1.50 for a returning conveyance.[11] So $350 is excessive for carrying a 14 year old girl past her station to another, where

[8] New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607.

[9] Chattanooga, R. & C. R. Co. v. Lyon, 89 Ga. 16, 15 S. E. 24. In this case the court quoted Harris, J., in Clements v. Bostwick, 38 Ga. 1: "For many years I have witnessed with uneasiness the quixotism which the bench displays whenever a woman is a party, or a woman's claim involved. I fear that it is an incurable insanity, as thus far it has exhibited no obedience to law, and is deaf to reason, and even insensible to ridicule."

[10] Trigg v. Railway Co., 74 Mo. 147.

[11] Marshall v. Railway Co., 78 Mo. 610. $750 is an excessive verdict for carrying a passenger past her station, and discharging her at the next one, where she remained with friends, without expense or charge, until the next day, when she was carried back, without expense, on another train. Georgia Railroad & Banking Co. v. Jett, 95 Ga. 236, 22 S. E. 251. Where a wreck necessitates a transfer of passengers, requiring them to walk about 100 yards, a female pas-

she is unacquainted, and from which she walked to her home, seven miles away, on a pleasant day in December, from which she experienced no ill effects, except soreness and a slight fever, which did not necessitate her going to bed.[12] So $200 is an excessive amount of damages for carrying a young man about three-fourths of a mile past his destination, and setting him down in a summer night in the woods, in company with other passengers; his only inconvenience being some delay in finding the station, getting his feet muddy and wet, and having to carry his grip through a drizzling rain.[13]

§ 569. EJECTION.

The following verdicts for the wrongful ejection of passengers have been held not to be excessive: $2,000, though no physical force was used, and only slight, if any, pecuniary loss was sustained, where the conductor's acts and words were grossly insulting, and the circumstances such as to entitle plaintiff, not only to compensatory, but exemplary, damages.[1] $1,250 for the wrongful ejection of a passenger from a train,

senger, who has been twice notified to alight by the conductor, but who prefers to remain in the car with an acquaintance, who offers to see her off in time to catch the other train, rather than expose herself to the open air, cannot recover punitive damages from the company for being left behind; and a verdict of $500 is greatly excessive, where she was carried back home and the money paid for the ticket refunded, and only slight personal discomfort and disappointment on her part were shown. Alabama & V. Ry. Co. v. Purnell, 69 Miss. 652, 13 South. 472.

12 Missouri, K. & T. Ry. Co. v. Snider (Tex. Civ. App.) 33 S. W. 557.

13 Howe v. Gibson, 3 Tex. Civ. App. 263, 22 S. W. 826.

§ 569. 1 Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. 757.

where defendant's employés used insulting and violent language towards him, in the presence of a large number of persons.[2] $1,000 for the wrongful expulsion of an old man from a train, accompanied by insult and vilification on the part of the conductor, and necessitating a walk of five miles to his destination.[3] $800, though no force was used, where the conductor used insulting language, and the passenger was compelled to walk 12 miles in consequence of the ejection.[4] $700 for ejection of a passenger, who, while standing on the car platform at a station, was rudely ordered by a railroad policeman to get off, and, on declining to do so, was cursed and abused by the officer, seized by the collar, and had one or more buttons torn from his clothes by the officer.[5] $562.50 for the expulsion of a passenger in a rough manner, accompanied with profane and unbecoming language.[6] $500, where the conductor used unnecessary violence and insult, which caused mental suffering and humiliation on the part of the passenger.[7] $300 for the wrongful ejection of a passenger in the nighttime during a rain storm, a mile and a half

2 Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 39 S. W. 987.

3 Georgia R. Co. v. Olds, 77 Ga. 673.

4 Charleston & S. Ry. Co. v. Varnadore, 94 Ga. 639, 21 S. E. 581.

5 Gulf, C. & S. F. Ry. Co. v. Perry (Tex. Civ. App.) 30 S. W. 709. $700 is not excessive for the wrongful expulsion of a passenger in a rude and angry manner, at a point not a station, and in the nighttime. Indianapolis, B. & W. R. Co. v. Milligan, 50 Ind. 392.

6 St. Louis & S. E. Ry. Co. v. Myrtle, 51 Ind. 566.

7 Gorman v. Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112. A verdict for $500, though heavy, will not be set aside as excessive for ejecting a passenger at a station, without force and without any resulting pecuniary loss, where the conductor charged plaintiff with forging

from one station and six or seven from another, where the conductor spoke "short and rough" to the passenger, and mortified his feelings.[8] $200 for a passenger who left a train at a station in pursuance of the conductor's command, though holding a ticket entitling him to be carried to his destination, and who immediately boarded the train again, and was carried to his destination on payment of the regular fare of 25 cents.[9] $195 for compelling a 16 year old boy, who had surrendered his ticket, to leave the car at an intermediate station, and who thereupon gave the conductor 10 cents, all the money he had.[10]

But the following verdicts have been held excessive: $5,000, where it appears that while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfigurement, no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing, or physician, little loss of time, not to exceed a day's delay, and no circumstances of outrage or insult inde-

the date of his ticket, though the conductor may have been acting under an honest mistake. Trice v. Railway Co., 40 W. Va. 271, 21 S. E. 1022. $500 is not excessive for the wrongful ejection of a passenger in a mortifying manner in the presence of fellow passengers, where plaintiff was compelled to walk a distance in the dark after midnight, and over a long railroad bridge, and where he was rendered ill for two weeks in consequence thereof. International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491.

[8] Fordyce v. Manuel, 82 Tex. 527, 18 S. W. 657.

[9] Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837.

[10] Indianapolis & St. L. Ry. Co. v. Howerton, 127 Ind. 236, 26 N. E. 792.

pendent of the actual expulsion.[11] $3,500, where there is no satisfactory evidence of the use of force or of physical injuries.[12] $3,000, where the only injury was a wrenching of the arm, causing a felon to appear on one of the fingers.[13] $2,500 where the conductor acted without malice, and plaintiff sustained no injury, except humiliation and mortification in being put off.[14] $1,500 for the ejection of a passenger who used grossly profane and indecent language in the presence of ladies, when the conductor, through an honest mistake, required him to pay 20 cents additional fare, and where no more force than necessary was used to eject him.[15]

[11] Missouri, K. & T. Ry. Co. v. Weaver, 16 Kan. 456. A verdict of $5,000 for the ejection of a passenger from a car for the alleged violation of a rule of the company is excessive, where the conductor did not act maliciously, and the passenger sustained no serious injuries except some bruises. South Fla. R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633. For the ejection of a passenger within a quarter of a mile from the station where he boarded the train, and without any bodily injuries or the use of unnecessary force, causing a delay of one day, and necessitating the buying of another ticket at an expense of $40.50, a verdict of $5,000 will be set aside as excessive. Quigley v. Railroad Co., 11 Nev. 350.

[12] Houston & T. C. R. Co. v. Crone (Tex. Civ. App.) 37 S. W. 1074.

[13] Cox v. Railroad Co., 11 Hun (N. Y.) 621.

[14] Louisville & N. R. Co. v. Wilsey (Ky.) 12 S. W. 275. In an action for ejecting a passenger at a station, where no extreme violence was used and no malice or wanton recklessness was manifested, and the plaintiff was not seriously or permanently injured thereby, a verdict of $2,500 is excessive. Chicago, R. I. & P. R. Co. v. Riley, 74 Ill. 70.

[15] Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499. A verdict of $1,500 for the forcible ejection of a passenger from a street car is excessive, where he sustained no personal injuries whatever, and no injury to his reputation or mental suffering is shown, beyond the fact that the newspapers published an account of the matter, and

$1,000, where the passenger sustained no personal injury from the removal, was delayed only one day in reaching home, and his entire pecuniary loss did not exceed $10.[16] $500 for the ejection of a passenger at a station, without force or insult, where he sustained no pecuniary injury by reason thereof.[17]

§ 570. SAME—PERSONAL INJURIES.

A verdict of $5,500 is not excessive for ejecting a passenger from the train in the nighttime at some distance from the depot platform, where he, while walking along the depot platform, fell over a truck, sustained serious injuries, depriving him of the use of an arm, with a

that he had been pointed out as the man who had been put off the car. Plaintiff was required to remit all over $500. Cunningham v. Power Co., 3 Wash. St. 471, 28 Pac. 745. While waiting at a steamboat ferry, the gates were forced open by the crowd, and plaintiff was involuntarily carried within, and while there a deck hand came up, and seized him by the coat, but released him on expostulation. Another employé of the ferry then came up, and seized plaintiff by the shirt collar, and pushed him out of a side gate, though plaintiff had offered to pay fare or leave. Held that, no malice being shown, a verdict for $1,500 was excessive. Doran v. Ferry Co. (City Ct. Brook.) 19 N. Y. Supp. 172, affirmed 138 N. Y. 628, 33 N. E. 1083. No violence was used in the expulsion of a female passenger from a train, and there was little evidence of rudeness on the conductor's part. She walked about a mile, and was thence taken up by a passing vehicle two miles further, to her friends. She suffered no direct physical injury from the walk, but the mental excitement consequent on the ejection produced an attack of insomnia and nervous paroxysms, to which she had previously been subject. Held, that a verdict of $1,400 was excessive, and that plaintiff would be required to remit all but $400. Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320.

16 Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

17 Louisville & N. R. Co. v. Breckinridge (Ky.) 34 S. W. 702.

strong probability that the injury will be permanent, and it appears that he was an active business man, earning between $150 and $200 per month.[1] Nor is $2,433.35 excessive in a case where a passenger was pushed off a moving train by the conductor, fell, and bruised his hip, and where he lost eight days' work in consequence, though he sustained no permanent injuries.[2] So $500 is not excessive, where a passenger was shoved from a moving train by the conductor, considerably bruising the passenger, and rendering him sore, and preventing him from working for a week.[3]

§ 571. SAME—GOOD FAITH OF CONDUCTOR.

A verdict of $100 is not excessive for ejecting a passenger under the mistaken belief that he had not paid his fare, though there was no force or insult, and though the mistake was immediately discovered by the conductor, and the passenger was taken back on the train before it left the station.[1]

But a verdict of $5,000 for the ejection of a passenger, accomplished without force or any physical injury, is properly set aside as excessive by the trial court, where he refused to comply with the conductor's request to sign his ticket for identification, as required by its terms.[2] For the expulsion of a passenger from a train

§ 570. [1] Ohio & M. Ry. Co. v. Judy, 120 Ind. 397, 22 N. E. 252.

[2] East Tennessee, V. & G. Ry. Co. v. Hyde, 89 Ga. 721, 15 S. E. 621.

[3] East Line & R. R. R. Co. v. Lee, 71 Tex. 538, 9 S. W. 604.

§ 571. [1] Gulf, C. & S. F. Ry. Co. v. Barnett (Tex. Civ. App.) 34 S. W. 449.

[2] Elliott v. Railroad Co., 58 Ga. 454.

without force or violence, a verdict of $1,700 will be set aside as excessive, where the conductor was not satisfied of his identity with the original purchaser of the ticket, and the additional expense was slight.[3] $1,000 for mental suffering is excessive, where the passenger was expelled without unnecessary force about a quarter of a mile from the station where he got on, and the conductor acted in good faith, believing he was not entitled to ride on the train.[4] So $500 for compelling a passenger to leave a car at a station is excessive, where the exclusion, though wrongful, was in good faith, and no special damages are alleged or shown, and no circumstances of aggravation appear, and there was no disturbance, no violence, no exhibition of ill will, and no assault.[5] So, also, £50 is an excessive verdict for putting a passenger off a train, without the use of unnecessary force, under an honest mistake as to whether

[3] Zion v. Southern Pac. Co., 67 Fed. 500. Verdict reduced to $850.

[4] Quigley v. Railroad Co., 5 Sawy. 107, Fed. Cas. No. 11,510. Verdict reduced to $100.

[5] Finch v. Railroad Co., 47 Minn. 36, 49 N. W. 329. Plaintiff required to consent to a reduction of the verdict to $250. A passenger was wrongfully expelled from a railway train by the conductor, who was acting in good faith, for refusal to pay an extra fare. He was a man of mature years, and was put off without violence, in the daytime, at a point nine miles from destination, which he reached by riding in a wagon, in a hot sun, at an expense of 50 cents. Held, that a verdict of $500 was excessive, necessitating a reversal unless a remittitur of $250 was duly filed. Texas & P. Ry. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400. A verdict of $500 is excessive for the wrongful ejection of a passenger, where the conductor acted in good faith, and the passenger sustained no physical injury, and was put to but slight expense. Reduced to $250. Gulf, C. & S. F. Ry. Co. v. St. John (Tex. Civ. App.) 35 S. W. 501.

he had surrendered his ticket, where the passenger was detained only a few hours, when he was taken up and carried to his destination by another train.[6]

§ 572. SAME—AT PLACE OTHER THAN A STATION.

A verdict of $1,166 is not excessive for putting a passenger off a train at a place not a station, where it appears that plaintiff was suffering from a distressing disease at the time, was compelled to walk back a mile and a half to the station through the mud, and that the disease was aggravated thereby, confining him to his bed, and compelling him, when partially restored, to leave his business, and resort to a water-cure establishment.[1] Nor is $1,000 excessive for putting off, either through mistake or carelessness, a husband, wife, and two small children, and their baggage, at a point three quarters of a mile from the station of their destination, in the middle of a cold December night.[2] Nor is $600 excessive for the ejection of a passenger in the nighttime several miles from a station, though not accompanied by excessive force or abusive language.[3] So $300 is not excessive for the ejection of a passenger about half a mile from a station, who rightfully refused to pay more than the regular ticket fare, though no unnecessary force was used.[4] Where a passenger, who offers to pay the regular fare, is expelled from a car in the nighttime at a

[6] Huntsman v. Railway Co., 20 U. C. Q. B. 24.

§ 572. [1] Illinois Cent. R. Co. v. Sutton, 53 Ill. 397.

[2] Baltimore, P. & C. Ry. Co. v. Pixley, 61 Ind. 22.

[3] Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381.

[4] Phettiplace v. Railroad Co., 84 Wis. 412, 54 N. W. 1092.

point not a station, on the ground that he has no ticket, after he has informed the conductor that the ticket office at the station was closed, a verdict of $200 is not excessive.[5] Nor is $100 excessive for the expulsion of a passenger, himself without fault, at a point not a regular station, where he was laden with bundles, and compelled to walk in the dark over a railroad bridge.[6] Nor is $50 excessive for the wrongful ejection of a passenger at a place not a station, compelling her to walk to her home, a distance of three and one half miles.[7]

But $1,500 for the wrongful ejection of a male adult passenger, who sustained no personal injuries by reason thereof, and who was merely compelled to walk three or four miles to his destination, is excessive.[8] So $1,000 for ejecting, at a point not a station, a passenger wrongfully on a train, is excessive, where no undue force was used, and no injury was sustained in consequence of the removal.[9] So a verdict for $750 is excessive, where a passenger is put off a train about 12 miles from his destination, and 5 miles from the place of departure, and there is no evidence as to the amount of actual damages sustained.[10] So $500 is an excess-

[5] Illinois Cent. R. Co. v. Johnson, 67 Ill. 312. But a verdict of $500 is excessive. Illinois Cent. R. Co. v. Cunningham, Id. 316.

[6] Chicago & A. R. Co. v. Flagg, 43 Ill. 364.

[7] Durfee v. Railway Co., 9 Utah, 213, 33 Pac. 944.

[8] Central R. & B. Co. v. Strickland, 90 Ga. 562, 16 S. E. 352.

[9] Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460; Terre Haute, A. & St. L. R. Co. v. Vanatta, 21 Ill. 187; Chicago & N. W. R. Co. v. Peacock, 48 Ill. 253.

[10] Tarbell v. Railroad Co., 34 Cal. 616. Verdict reduced to $100. $750 for the wrongful ejection of a passenger from a train on a rainy day, more than a mile from any house, and three or four miles from

ive verdict for the expulsion of a male passenger, without force, on a summer evening, necessitating a walk of three and a half miles, and resulting in no injury or sickness.[11]

§ 573. COMPELLING PAYMENT OF TWO FARES.

For compelling a passenger to pay a second fare of $3.25 by a conductor who is satisfied that the passenger has surrendered his ticket to a former conductor, a verdict of $500, though large, is not so excessive as to require the supreme court to set it aside, over the approval of the trial judge.[1]

§ 574. PRACTICE—REMITTITUR.

In most states, the practice, where a verdict has been found to be excessive, is that the court, instead of simply ordering a new trial, will give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and, upon his remitting the excess, will give him judgment for the residue, and deny the motion for a new trial; and this in actions of tort, where there is no fixed rule of compensation, as well as upon contract.[1] Such practice is so common

a station, is excessive, in the absence of any ground for substantial damages other than physical or mental suffering, or any facts entitling him to exemplary damages. Gillen v. Railway Co., 91 Wis. 633, 65 N. W. 373.

[11] Toledo, W. & W. Ry. Co. v. Wright, 68 Ind. 586.

§ 573. [1] East Tennessee, V. & G. Ry. Co. v. King, 88 Ga. 443, 14 S. E. 708.

§ 574. [1] Belknap v. Railroad, 49 N. H. 358; Hamilton v. Railway

and so promotive, not only of justice, but of ending the litigation, that it is almost essential to the proper conduct of a jury trial that the court should possess the power.[2]

But in some states a different rule prevails. In an action for personal injuries, the trial court has no right to require plaintiff to remit a portion of the damages as a condition of refusing a new trial, where the defendant objects to this course. It is the duty of the trial court to grant a new trial unconditionally if it deems the damages excessive, though the rule is otherwise in actions on contracts or for torts to property, in relation to which fixed rules for measuring damages are recognized. To say that the verdict of the jury should not have exceeded a certain sum in an action for personal injuries is to invade their peculiar province, and to assume their functions.[3] So where counsel for the prevailing party, in addressing the jury, brings before

Co., 17 Mont. 334, 43 Pac. 713; Cleveland, C., C. & St. L. Ry. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429, citing numerous cases in support of the practice. A territorial supreme court, proceeding according to common law, has no power to reduce a verdict in an action for personal injuries, without submitting the case to another jury, or putting plaintiff to the election of remitting part of the verdict before rendering judgment for the rest. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696.

2 Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181.

3 Savannah, F. & W. Ry. v. Harper, 70 Ga. 119. This is also the rule in Texas. Missouri, K. & T. Ry. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496, and cases cited. But when, in view of all the evidence, the verdict does not appear to be excessive, and plaintiff remits a portion of it, judgment may properly be rendered for the remainder. International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491.

them extraneous matter and statements of fact not in evidence, which are calculated to divert the attention of the jury from the issues in the case, and to excite passion and prejudice against the losing party, and the trial court, upon a motion for a new trial, finds and states that the verdict returned by the jury is grossly excessive, and that it was given under the influence of passion and prejudice arising from the misconduct of the prevailing party, a mere remittitur from the verdict is not sufficient, but it should be set aside, and a new trial granted.[4]

§ 575. INADEQUATE DAMAGES.

The power of the court to set aside verdicts is not confined to those awarding excessive damages, but extends to those where the damages awarded are inadequate. But to justify interference with a verdict in a personal injury suit on the ground that the damages are inadequate, it must appear that they are so grossly dis-

[4] Atchison, T. & S. F. R. Co. v. Dwelle, 44 Kan. 394, 24 Pac. 500. A remittitur to cure error comes too late after the supreme court has acted on the record, and the judgment has been reversed and the cause ordered to be remanded. Galveston, H. & S. A. Ry. Co. v. Wesch, 85 Tex. 593, 22 S. W. 957. A party who remits part of a judgment in his favor to avoid a reversal on the ground of excessive damages cannot prosecute error to reverse the judgment thus reduced in amount, though the court may have been wrong in finding that the judgment was excessive. Iron R. Co. v. Mowery, 36 Ohio St. 418. On granting a new trial on the ground that the damages are excessive, it is error to impose on the moving party all the costs of the action. It should be made to pay only the costs of the trial, including witness fees and disbursements, and the costs of opposing the motion. Buck v. Webb, 58 Hun, 185, 11 N. Y. Supp. 617.

proportionate to the injuries that in awarding them the jury must have been influenced by a perverted judgment.[1] Thus a verdict of $1,000 for three fractured ribs, and injury to a hip, which causes plaintiff to walk lame three years afterwards, will not be disturbed as inadequate, where the jury may well have found that the injuries will not be permanent.[2] Nor will a verdict of $1 be set aside as inadequate for injuries alleged to have been sustained in alighting from a train, where it appears that, after the injury, plaintiff walked to his home, retired without mentioning the accident to his wife until the next morning, and that then he was seen walking around town as usual, with a small sticking plaster on his face, though he testified that he was severely bruised, that he consulted a physician, and that his capacity to labor has been impaired.[3]

But, in an action for ejecting a passenger, where the jury finds the ejection to be wrongful, the trial court has the right to set aside a verdict for one cent damages as inadequate.[4]

§ 575. [1] McDermott v. Railway Co., 85 Wis. 102, 55 N. W. 179.

[2] Id.

[3] Allison v. Railway Co. (Tex. Civ. App.) 29 S. W. 425.

[4] Le Van v. Railroad Co., 5 Wkly. Notes Cas. (Pa.) 293. A conductor honestly refused to accept a passenger's ticket, on the ground that it had been improperly punched, and, on the passenger's refusal to pay fare, the conductor gave him in custody of a police officer on a charge of fraudulently attempting to evade payment of fare, and he was taken to a magistrate, where he was discharged; the whole affair being over in less than half an hour. Held, that it could not be said that a verdict for only nominal damages proved either bias or prejudice on the part of the jury, and such verdict would not be disturbed. Toomey v. Railroad Co., 2 Misc. Rep. 82, 21 N. Y. Supp. 448.

CHAPTER XXXIX.

DEATH BY WRONGFUL ACT.

§ 576. Common-Law Rule.
577. Modern Statutes.
578. Same—Massachusetts Statutory Provisions Pertaining to Passengers.
579. Same—Statutes of Missouri, Colorado, and New Mexico.

§ 576. COMMON-LAW RULE.

It is a familiar rule of the common law that "in a civil court the death of a human being could not be complained of as an injury." [1] The reason of this rule is purely historical. In the early history of the Teutonic race, the slaying of a human being imposed on his surviving kindred the duty of waging a blood feud against his slayers, until a life for a life had been exacted. The earliest laws of the race had for their object the abolition of these feuds, and this object was sought to be attained by fixing a graduated scale of payments for the killing of human beings; the highest penalties being exacted for the death of nobles and lords, the lowest for villains and slaves. The payment of this "wer gild," as it was called, rendered the feud illegal. As the race grew more civilized, and the law grew stronger in England, another step in advance was taken. Instead of permitting a wealthy criminal to buy his peace, by the payment of a sum of money to the

§ 576. [1] Baker v. Bolton (1808) 1 Camp. 493, per Lord Ellenborough.

surviving relatives of the murdered man, the law hanged him on the gallows, and confiscated all his estate for the benefit of the crown. The entire system of compensation for the death of human beings was abolished at one blow, and no nice distinctions were made between deaths caused intentionally and feloniously and those caused by mere negligence, in respect to the right of compensation.[2]

§ 577. MODERN STATUTES.

Such continued to be the law for many centuries, and it does not seem to have given rise to much injustice. But the ever-increasing number of deaths from mere negligence, as distinguished from felonious killings, consequent on the application of steam to our modern industrial system, and the multiplication of wealthy and powerful corporations which could not be hanged even for crimes, left an ever-increasing number of persons absolutely without a remedy for the death of near relatives, on whose earnings they depended for subsistence. Justice, therefore, imperatively demanded that jurisprudence take another step in advance. The courts, however, found themselves powerless to take the step, in the face of tradition and history, and the comparatively modern theory that they have no power to make law, but only to declare it. Accordingly, the legislative branch of the government was compelled to intervene. In 1846 a statute was passed in England, commonly known as "Lord Campbell's Act," [1]

[2] See 2 Pol. & M. Hist. Eng. Law, "Crime & Tort," pp. 447–460, c. 8. § 577. [1] 9 & 10 Vict. c. 93.

which gives a right of action whenever death is caused by the wrongful act, neglect, or default of another, such as, if death had not ensued, would have entitled the injured party to maintain an action. In 1847 a similar statute was passed in New York, and now statutes in all the states authorize recovery for the wrongful or negligent killing of human beings.

The questions litigated under these statutes are so numerous that an attempt to discuss them in a single chapter would be futile; and, since the larger portion of the statutes make no distinction in favor of passengers, the discussion does not legitimately fall within the scope of this work. But in a few of the states special statutory provisions exist, pertaining exclusively to the death of passengers; and these will now be considered.

§ 578. SAME—MASSACHUSETTS STATUTORY PROVISIONS PERTAINING TO PASSENGERS.

In Massachusetts it is provided that "if, by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine, * * * to be recovered by indictment." [1]

§ 578. [1] Pub. St. Mass. c. 112, § 212.

The distinction in favor of passengers made by this statute is that if the person killed was a passenger, it is not necessary for plaintiff to prove that he was not negligent at the time of the accident, while, if deceased was not a passenger, the burden of showing that he was in the exercise of due diligence rests on plaintiff.[2]

Since the statute gives a right of action only where the corporation operating the road was itself guilty of negligence, or if its servants were unfit or guilty of gross negligence, there must be some degree of culpability on the part of the corporation or of its servants; and, where the roadbed is leased from another person or corporation, which is bound to keep the track in good repair, the company operating the road is not liable for the death of a passenger caused by a defect in the roadbed of which it did not know, and could not have known. If, however, the defect might have been discovered by the exercise of due care, defendant will be liable, whether the defect was in the original construction of

2 McKimble v. Railroad, 139 Mass. 542, 2 N. E. 97; Merrill v. Railroad Co., 139 Mass. 252, 29 N. E. 666. A passenger on a street car descended on the side of the car next to a parallel track. When he touched the ground, there was a car on the parallel track approaching him, not more than five or six feet away. Without looking, and without heeding warnings given him by others, he stepped on the parallel track, in front of the approaching car, and was killed. Held, that at the time of the accident the relation of passenger and carrier had ceased, and that, though, as a matter of law, it may not be negligence for one to cross a street-car track without looking, yet there was no evidence that deceased exercised due diligence, and hence there could be no recovery. Creamer v. Railway, 156 Mass. 320, 31 N. E. 391.

the road, or was due to a failure of the lessor to make necessary repairs, or however otherwise it might have been caused. If the defendant carried its passengers into a place which it knew, or ought to have known, was dangerous, it was negligent, although it did not create, and had no right to remove, the danger.[3]

It will also be observed that while the corporation is liable for the death of a passenger, if caused by its own negligence, yet, if the death was caused by the act or default of its servants, either unfitness or gross negligence on their part must be proven. Under this provision, it has been held that where a trackmaster suffers a hand car to be on the track through a mistake of time, occasioned by his failure to correctly observe the hour indicated by his watch, and a passenger is killed by a collision of his train with the hand car, there is sufficient evidence of gross negligence on the part of a servant to take the case to the jury.[4]

In addition to the remedy by indictment, the statute also gives the executor or administrator the right to maintain an action in tort if the corporation is a railroad corporation; but, of course, only one of the two remedies is available.[5] By statute passed in 1886,[6] a similar right of action is given executors and adminis-

[3] Littlejohn v. Railroad, 148 Mass. 478, 483, 20 N. E. 103.

[4] Com. v. Vermont & M. R. Co., 108 Mass. 7. An allegation that by reason of the unfitness, gross negligence, and carelessness of A., the servant of defendant corporation, and engaged in its business, the life of a passenger was lost, is sufficient. Com. v. Brockton St. R. Co., 143 Mass. 501, 10 N. E. 506.

[5] Pub. St. Mass. c. 112, § 212.

[6] St. 1886, c. 140.

trators where the corporation is a street-railway corporation. Before the enactment of this statute, a street-railway corporation was not liable to an action of tort for the loss, by reason of its negligence or that of its servants, of the life of a person, whether passenger or not; the only remedy being by indictment.[7]

§ 579. SAME—STATUTES OF MISSOURI, COLORADO AND NEW MEXICO.

Statutes in Missouri, Colorado, and New Mexico give a right of action whenever a person shall die from an injury resulting from the negligence, unskillfulness, or criminal intent of any officer, servant, or employé while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other public conveyance while in the charge of the same as driver, or when any passenger shall die from any injury resulting from any defect in any railroad or in any part thereof, or in any locomotive or car, or in

[7] Holland v. Railroad Co., 144 Mass. 425, 11 N. E. 674. Still another statute gives the executor or administrator a right of action "if the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stagecoach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents." If an indictment alleges that defendants were common carriers of passengers for hire in a steamboat, and that deceased was a passenger for hire in said steamboat, no further averment relating to their tolls is necessary, and the indictment is not subject to demurrer for the reason that such further allegations may be defective. Com. v. East Boston Ferry Co., 13 Allen (Mass.) 589.

any stagecoach or other public conveyance.[1] With reference to persons injured, this statute may be divided into two parts; the first giving a right of action to any person injured by the negligence, etc., of any employé, and the second giving a right of action where a passenger is killed by reason of defects in the means of transportation.[2]

In all these states, however, other statutes, substantially similar to Lord Campbell's act, give a right of action for the death of a person "caused by the wrongful act, neglect, or default of another." [3] Under this statute, the supreme court of Missouri has held that no action can be maintained where the wrongful act merely hastened death; as where a man mortally wounded is transported over a railroad against his will, and such transportation hastens death.[4]

§ 579. [1] Rev. St. Mo. 1889, § 4425; Mills' Ann. St. Colo. § 1508; Comp. Laws N. M. 1884, § 2309, as amended by Laws 1891, c. 49.

[2] Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185.

[3] Rev. St. Mo. 1889, § 4426; Mills' Ann. St. Colo. § 1509; Comp. Laws N. M. 1884, § 2309, as amended by Laws 1891, c. 49.

[4] Jackson v. Railway Co., 87 Mo. 422.

CHAPTER XL.

BAGGAGE.

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§ 580. CARRIER'S LIABILITY.

A common carrier of passengers is an insurer of the passenger's baggage against all loss or damage, except for that caused by the act of God or by the public enemy.

The principles governing the carrier's liability for the passenger's baggage were not settled without a struggle, and do not seem to have been firmly established in England until a comparatively recent day. As late as 1865, Pollock, C. B., said: "I retain the opinion that a carrier undertakes no responsibility in respect of the baggage of a passenger beyond that which he un-

dertakes in respect of the passenger himself." [1] But it is now the settled law of England that the liability of common carriers in respect of articles carried as passenger's luggage is that of carriers of goods, as distinguished from that of carriers of passengers.[2]

In this country it was long ago held that, although the proprietors of public conveyances are not responsible for injuries to the persons of passengers, unless they happen from the want of such care and diligence as is characteristic of cautious persons, yet they are liable for the baggage of passengers at all events, except from such losses as arise from the act of God and the public enemies.[3] And the code provisions of California, Montana, and Dakota are identical with the common-law rule on this subject.[4] So the supreme court of Louisiana has held that under the Louisiana

§ 580. [1] Stewart v. Railway Co., 3 Hurl. & C. 138.

[2] Macrow v. Railway Co. (1871) L. R. 6 Q. B. 612, 618.

[3] Camden & A. R. & T. Co. v. Burke (1835) 13 Wend. (N. Y.) 611; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Powell v. Myers, 26 Wend. (N. Y.) 591; Merrill v. Grinnell, 30 N. Y. 594, 609; Dibble v. Brown, 12 Ga. 217. See, to same effect, Ringwalt v. Railway Co., 45 Neb. 760, 764, 64 N. W. 219; Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230; Dill v. Railroad Co., 7 Rich. Law (S. C.) 158; Peixotti v. McLaughlin, 1 Strob. (S. C.) 468; Johnson v. Stone, 11 Humph. (Tenn.) 419; Bomar v. Maxwell, 9 Humph. (Tenn.) 620; Wilson v. Railroad Co., 21 Grat. 654, 664.

[4] The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property. Civ. Code Cal. § 2182; Civ. Code Dak. § 3891; Civ. Code Mont. 1895, § 2892. Pub. St. N. H. 1891, p. 454, § 16, renders railroad companies absolutely liable for the safe transportation of baggage, and, in default thereof, to the payment of its value.

Code [5] a common carrier is liable as such for the baggage of a passenger.[6]

§ 581. SAME—CONSIDERATION FOR CARRIAGE.

At the time of Lord Holt it seems to have been thought that a coachman who carried luggage for a passenger by the coach was a mere gratuitous bailee, and not only was not liable as a common carrier, but was not bound to take that degree of care which a bailee for hire would have to take.[1] But it is now well settled, both in England and in this country, that the price paid for the transportation of the passenger includes also the price for the transportation of the ordinary baggage required for his personal accommodation.[2]

[5] Rev. Civ. Code La. art. 2754, provides: "Carriers and watermen are liable for the loss or damage of things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events."

[6] Blossom v. Hooper, 16 La. Ann. 160. Steamships engaged in carrying passengers from one port to another are responsible for the loss or damage done to baggage while on board, which has been placed in custody of the officers of the vessel whose duty it is to receive and take care of baggage. Moore v. The Evening Star, 20 La. Ann. 402.

§ 581. [1] Middleton v. Fowler, 1 Salk. 282; Upshare v. Aidee, Comyn, 25.

[2] Cohen v. Railway Co., 2 Exch. Div. 253, 258; Macrow v. Railroad Co., L. R. 6 Q. B. 612, 617; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 86; Smith v. Railroad, 44 N. H. 325. The price paid by a passenger on a steamboat includes the charge for the transportation of his baggage; and, as the carrier must provide some one to care for it, that person is the agent of the carrier, although he is not one of the crew or paid by the carrier, but a porter, who receives his compensation from the passenger. Perkins v. Wright, 37 Ind. 27.

Nor is it necessary that the fare be paid by the passenger himself. The duty to carry safely is imposed by law; and hence the fact that a master takes and pays for his servant's ticket does not prevent the servant from recovering in his own name from the railroad company for the loss of his baggage.[3]

As to a gratuitous passenger, it has been held that a railroad company is merely a gratuitous bailee in respect to his baggage, also carried free, and is liable only for bad faith or gross negligence.[4] So, though a statute gives a passenger a right to carry a certain amount of baggage free, yet a condition in an excursion ticket, sold at almost one-half the regular fare, that the purchaser shall not carry any luggage, is valid; and the company is entitled to the regular freight rates for carrying the luggage.[5]

§ 582. SAME—ACT OF GOD.

It is a complete defense to an action against a common carrier for loss of baggage to show that it was destroyed by a flood of such unprecedented character as could neither have been anticipated nor provided against, and which amounted to an act of God. The Johnstown flood on May 31, 1889, where there had been heavy rains and landslides, until a reservoir dam gave

[3] Marshall v. Railway Co. (1851) 11 C. B. 654.

[4] Rice v. Railroad Co., 22 Ill. App. 644; Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111. These cases would seem to conflict in principle with those holding that a carrier owes the same measure of duty to a gratuitous passenger as to a paying passenger. See ante, § 235.

[5] Rumsey v. Railway Co., 14 C. B. (N. S.) 641.

way, and a wall of water over 20 feet high swept down the valley of the Conemaugh, was an act of God; and a railroad company is not liable for the loss of baggage contained in a baggage car struck by the flood, and so utterly destroyed that not a vestige of the car or any of the baggage was ever found.[1] So a railroad company is not liable for injury to baggage which it has checked for transportation, but which was submerged in its depot by a sudden and extraordinary flood, which prevented the running of trains. But if the company could have saved the baggage by the exercise of reasonable care after the flood came, taking into consideration the surroundings of the parties, and the sudden character of the flood, then it would be liable for its loss.[2]

If the baggage is lost, not through the act of God, but by the act of man, the carrier is liable. A vessel which had sprung a leak in a violent gale was abandoned, after full consultation between captain and officers, in the belief that she would sink, and the passengers were transferred to another vessel. The abandoned vessel, however, did not sink, but was found in the ocean by other vessels, and was towed into port. It was held that the vessel was liable for the value of a passenger's baggage which was stolen after the vessel was abandoned.[3] It is the duty of a railroad company

§ 582. [1] Long v. Railroad Co., 147 Pa. St. 343, 23 Atl. 459; Wall v. Railroad Co., 162 Ill. 545, 44 N. E. 888; Id., 60 Ill. App. 469.

[2] Strouss v. Railway Co., 17 Fed. 209.

[3] Reed v. Compagnie Generale Transatlantique, 1 City Ct. Rep. (N. Y.) 16. The court said: "The plaintiff's property was pillaged while upon defendants' vessel, and, as insurers against theft and robbery, the defendants must make good the loss. The peculiar circumstances

to forward a passenger's baggage on the same train on which he travels, and its negligent failure so to do renders it liable for the destruction of the baggage by an act of God, where it would have escaped such destruction had it been forwarded on the proper train.[4]

§ 583. SAME—ACT OF PUBLIC ENEMY.

A common carrier of a passenger's baggage is not liable for loss or damage caused by the act of the public enemy; as where, during the Civil War, a detachment of Confederate cavalry captured a train.[1] But while the capture of the vessel of a common carrier by the public enemy releases him from all further obligation respecting the cargo and passenger's baggage, yet where the enemy expressly limits the capture to the vessel and her cargo, and expressly announces that the personal effects of the passengers will be respected, the baggage is not captured, and the carrier's liability continues.[2]

which led to the loss do not militate either against the propriety or stringency of the rule. If the vessel, without negligence, had gone down, the act of God would have been a complete answer to the action; but, as it did not go down, there is no legal answer to it, for the plaintiff's property disappeared, not through the act of God, but by the dishonest act of man, for which the defendants are answerable as common carriers."

[4] Wald v. Railroad Co., 162 Ill. 545, 44 N. E. 888, reversing 60 Ill. App. 460.

§ 583. [1] Philadelphia, W. & B. R. Co. v. Harper, 29 Md. 330. Where the passenger is an officer in command of soldiers, the carrier is not liable for the injury or destruction of his baggage by the mutinous acts of the soldiers. Martin v. Railway Co., L. R. 3 Exch. 9.

[2] Spaids v. Steamship Co., 3 Daly, 139. During the Civil War, a

§ 584. SAME—SEIZURE ON LEGAL PROCESS.

It has been doubted whether the baggage of a passenger, while being transported, is subject to garnishment. The wearing apparel which the trunk contains is exempt from legal process, and the trunk itself ought to be while on the journey. And it has been held that, where the baggage is outside of the jurisdiction when process is served on the company, the fact that it afterwards comes within the jurisdiction in the due course of transportation does not render it subject to garnishment.[1]

§ 585. SAME—INSTANCES WHERE LIABILITY HAS BEEN ENFORCED.

Since the carrier is absolutely liable for safety of the baggage, he is liable for its misdelivery on a forged order.[1] So a railroad company is liable for injuries to baggage caused by exposure to rain while in its possession.[2] In ejecting a passenger from a train, the

Union vessel sailing from New York was captured by an armed Confederate cruiser. The Confederate officers provided a schooner to take back the passengers, and stated that the passengers and their baggage would not be interfered with, but that the vessel was their prize. The transfer of the passengers and their baggage was under the superintendence of the captain of the Union vessel, and the baggage of one of the passengers was not transported, but lost. Held, that the owners of the Union vessel were liable for its loss. Id.

§ 584. [1] Western R. v. Thornton, 60 Ga. 300.

§ 585. [1] Powell v. Myers, 26 Wend. (N. Y.) 591.

[2] Estes v. Railroad Co., 55 Hun, 605, 7 N. Y. Supp. 863.

train hands have no right to put his baggage in a place where it will be injured.[3]

It would seem, on principle, that since the carrier's liability is absolute, and does not depend on negligence, contributory negligence on the part of the passenger is no defense to the carrier. It has accordingly been held that the proprietors of a stage coach are liable for the loss of a trunk, although the passenger, after his arrival at destination, permitted the coach to proceed with his trunk, without any inquiry for it, and though he was silent on the subject for an hour after the coach had left.[4] But it has been held in Louisiana

[3] Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 30 S. W. 574. A passenger got into a dispute with the baggage master about extra baggage charges, and he demanded a return of his baggage. This the baggage master refused to do, though the baggage was in plain view, and it was carried on the train, then about to start. Plaintiff refused to take passage, and the next day plaintiff called on the president of the road, who promised that the baggage should be stopped for plaintiff at an intermediate station. Plaintiff then pursued his journey on another train on the same road, but his baggage was not stopped at the intermediate station, as promised, but was carried through to plaintiff's destination. It was stored in defendant's depot, and was destroyed by a fire, for which defendant was not responsible. Plaintiff arrived at his destination the day after the fire. Held, that the original transportation of the baggage against plaintiff's wishes constituted a conversion of the baggage; that there was no subsequent resumption of possession by plaintiff, so as to waive the original conversion; and that a duty rested on defendant to replace, in the actual custody and possession of plaintiff, the property wrongfully taken from him, if it desired to escape liability. McCormick v. Railroad Co., 99 N. Y. 65, 1 N. E. 99; Id., 49 N. Y. 303. But see Id., 80 N. Y. 353.

[4] Cole v. Goodwin, 19 Wend. 251.

that where a trunk has by mistake been carried to the wrong place, but afterwards returned to the passenger uninjured, there can be no recovery for detention of baggage, if the negligence of the passenger in failing to look at his baggage check contributed to the mistake.[5]

§ 586. DUTY TO CARRY.

A common carrier of passengers must receive and carry a reasonable amount of baggage for each passenger, without any charge except the payment of passenger's fare.

"The carriage of the baggage of the passenger, under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger, and the duty arises on the part of the company to carry the baggage of the passenger, as incident to the principal contract, without any specific agreement or separate compensation. The obligation includes, moreover, as in the case of merchandise, an obligation to deliver the baggage carried. There arises, therefore, on the sale of a passenger's ticket, a contract to carry the person and the baggage of the passenger between the points indicated, on the road of the company issuing it, and to deliver the baggage at the end of the route to the passenger or his duly-authorized agent." [1]

This duty exists not only at common law, but is im

[5] Gonthier v. Railroad Co., 28 La. Ann. 67.

§ 586. [1] Isaacson v. Railroad Co., 94 N. Y. 278, reversing 25 Hun, 350.

posed by statute in many of the states.[2] In this country it is also customary for the carrier, on the receipt of baggage, to check it; that is, to affix to each parcel a metallic check, with numbers stamped thereon, and to deliver a duplicate to the passenger or owner. This custom has received legislative sanction, and railroad companies are required by statute in many of the states to check the passenger's baggage.[3]

But the duty to transport baggage without extra charge exists only as to such articles as are baggage within the legal meaning of the term. Under a ticket entitling the holder to "personal passage only," he has no right to carry with him groceries for the use of his family. But the officers of the railroad company, after he enters the car, cannot lawfully take such packages from him by force. The remedy of the company, after giving him notice to remove such packages from the car, and his refusal to do so, is to remove the passenger and his packages, using no unnecessary force.[4]

A carrier has also the right to inquire of any passenger who offers a trunk to be transported over its

2 Civ. Code Cal. §§ 2180, 2183; Civ. Code Mont. 1895, §§ 2890, 2893; Pub. St. N. H. 1891, p. 454, § 15; Comp. Laws N. M. 1884, § 2660; Laws N. Y. 1850, c. 140, § 37; Pub. St. R. I. p. 405, c. 158, § 3; Sayles' Civ. St. Tex. art. 4230.

3 In Isaacson v. Railroad Co., 94 N. Y. 278, the court said, in reference to the New York statute relating to the checking of passenger's baggage (Laws N. Y. 1847, c. 272, § 6; Laws 1850, c. 140, § 37): "They contain, so far as we know, the first legislative recognition of a system which has so expanded to meet the growing demands of the business, so that the checking of baggage has become the common incident of railroad transportation in the United States."

4 Delaware, L. & W. R. Co. v. Bullock (N. J. Sup.) 36 Atl. 773.

road whether it contains his personal baggage; and where a passenger has been in the habit of taking with him, in his trunk, and of having carried in this way, articles of merchandise, contrary to the usages and regulations of the railroad company, the carrier has the right to require him to furnish satisfactory proof of what his trunks contain, and, upon his refusing and declining to furnish such proof, the carrier is warranted in refusing to receive and check such trunks as baggage, and will not be liable in damages to the passenger for such refusal.[5]

The carrier is also bound to deliver the baggage to the passenger within a reasonable time after its arrival

[5] Norfolk & W. R. Co. v. Irvine, 85 Va. 217, 7 S. E. 233; 84 Va. 553. Code Va. 1873, c. 61, § 17, which prescribes a penalty for refusal to transport or deliver property when offered for transportation, does not preclude a recovery of a greater sum, as actual damages, by a passenger whose baggage the company refused to carry, since chapter 145, § 5, expressly authorizes a recovery of actual damages in cases where a statutory penalty is imposed. Norfolk & W. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532. Where a passenger takes merchandise in his trunk on board of a steamer, bound for a foreign port, to be carried as baggage, and no fraud or concealment is attempted, the steamship company cannot confiscate such property, though carried on board the vessel in violation of its rules, and supposed by it to have been an attempt to violate the United States laws respecting the manifest of cargo. Tanco v. Booth (Com. Pl.) 15 N. Y. Supp. 110. St. Mass. 1854, c. 23, prescribes a penalty of $10 for refusal of a railroad company to check the baggage of a passenger delivered to it for transportation. It has been held that a railroad corporation which in fact receives the baggage of a passenger upon a train on which it is not bound to take it, to be transported over a portion of the road for which he has purchased a ticket, is subject, upon refusing to check the baggage, to the statutory penalty. Com. v. Connecticut R. R. Co., 15 Gray (Mass.) 447.

at destination.[6] So a deposit of a passenger's luggage in a cloak room is subject to the implied condition that it shall be delivered on a reasonable demand; and in an action for delay in delivery the jury is at liberty to find that a demand on Sunday is a reasonable demand, in view of the fact that railroad companies invite passengers to travel on Sunday.[7]

§ 587. WHAT CONSTITUTES BAGGAGE.

Baggage is such personal property of the passenger, delivered to the carrier for transportation, which the passenger takes with him for his personal use or convenience, according to the habits or convenience of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey.

The term "baggage" has been variously defined;[1] and the foregoing definition, which is substantially

[6] Acts Iowa 13th Gen. Assem. c. 165, § 1, makes common carriers liable for damages to passenger's luggage, and section 2 provides that for every day's delay to travelers in consequence of such damage the carrier shall pay to the traveler three dollars. Held, that this statute does not authorize a recovery for detention of baggage without any damage or injury thereto. Anderson v. Railroad Co., 32 Iowa, 86.

[7] Stallard v. Railway Co., 2 Best & S. 419.

§ 587. [1] Luggage means that description of goods which travelers usually carry as part of their luggage, and it may include other articles than such as are carried for the personal use and convenience of the traveler himself. Hudston v. Railway Co., L. R. 4 Q. B. 366. Baggage includes such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement,

that of Justice Cockburn in Macrow v. Railway Co.,[2] is probably the most satisfactory to be found in the Reports. The California Code [3] contains this definition: "Luggage may consist of articles intended for the use of the passenger while traveling or for his personal equipment." The term "luggage," as here used, has the same meaning as the word "baggage." [4] With reference to this definition, the supreme court of California has said: "Before the enactment of this Code, courts acknowledged the difficulty of defining with accuracy what should be deemed baggage, within the rule of the carrier's liability; and we think this provision of the Code has disincumbered the subject little, if any, of the previous difficulty which surrounded it. If we define the word 'equipment' as Webster defines it, viz. the act of equipping or being equipped for a voyage or expedition, it adds nothing to what had long before been understood as comprehended in the word 'baggage.'" [5]

or protection, having regard to the length and object of their journeys. Parmelee v. Fischer, 22 Ill. 212. By baggage is understood such articles of necessity or personal convenience as are usually carried by passengers for their personal use. Dibble v. Brown, 12 Ga. 217. "What is signified by the term 'baggage' is perhaps nowhere precisely defined, though many judges have expressed an opinion as to what is not. But it appears to us that whatever forms the necessary appendages of the traveler may be legitimately considered as baggage, and placed in his trunk for conveyance." Jones v. Voorhees, 10 Ohio, 145. As to the necessity of delivery to the carrier, see post, § 636.

[2] L. R. 6 Q. B. 611, 622.

[3] Civ. Code Cal. § 2181.

[4] Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. 686.

[5] Metz v. Railroad Co., 85 Cal. 329, 24 Pac. 610.

It is quite clear from the authorities that no unvarying test can be laid down by which to determine what is and what is not baggage. It has been well said: "What is and what is not baggage depends on the circumstances of each individual case,—upon the length of the journey, the purpose for which it is made, the position in life and occupation of the traveler, the mode of conveyance, and the character of the country through which he intends to pass. Anything may be carried as baggage which travelers usually carry for their personal use, comfort, instruction, or amusement, having regard to the circumstances enumerated. But articles carried for sale are not baggage, whatever the articles may be." [6] Nor does the liability of the carrier extend be-

[6] Spooner v. Railroad Co., 23 Mo. App. 403. It is not practicable to state with precise accuracy what shall be included by the term "baggage." It certainly includes articles of necessity and personal convenience, usually carried by passengers for their personal use; and what these may be will very much depend on the habits, tastes, and resources of the passenger. It also includes money to that extent which may be convenient to meet the traveling expenses. Johnson v. Stone, 11 Humph. (Tenn.) 419. The term "baggage" includes a reasonable amount of money in the trunk of a passenger intended for traveling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and it does not extend to money, merchandise, or other valuables, which are designed for a different purpose, although carried in the trunks of passengers. Woods v. Devin, 13 Ill. 746. "The term 'baggage' includes, not only all articles of apparel, whether for use or ornament, * * * but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the works of the student and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of journeying. On the other hand, the term 'ordinary luggage' being thus confined to that

yond the value of reasonable articles of apparel or convenience, and for such sum as may be deemed necessary for the passenger's expense, according to his condition of life, and the journey he has undertaken.[7]

§ 588. SAME—PROVINCE OF COURT AND JURY.

As a general rule, the question what is baggage is one of fact for the jury, since its correct solution depends upon a variety of circumstances, such as the traveler's condition in life, his habits, vocation, and tastes, the length of his journey, whether he travels alone or with his family, and of the usage of time and place.[1] Thus,

which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage,' unless accepted as such by the carrier." Macrow v. Railway Co. (1871) L. R. 6 Q. B. 611, 622.

[7] Del Valle v. The Richmond, 27 La. Ann. 90. Common carriers are only responsible to a passenger for the loss of a reasonable amount of baggage, to include such articles as are necessary and convenient for the personal use of the passenger, and usual for persons traveling to take with them. New Orleans, J. & G. N. R. v. Moore, 40 Miss. 39.

§ 588. [1] Dibble v. Brown, 12 Ga. 217; Brock v. Gale, 14 Fla. 523. "The question as to what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule is to be determined by the jury, according to the circumstances of the case, subject to the power of the court to correct any abuse." Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230. The jury, in determining for what baggage a traveler is entitled to recover from the carrier in case of loss, may take into consideration what he has been in the habit of carrying in his travels for his personal convenience or use within a reasonable limit, or what a person so circumstanced is ordinarily in the habit of carrying. Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225.

the supreme court of the United States has held that the question whether costly articles of wearing apparel are baggage is one of fact for the jury, and not of law for the court.[2]

But, nevertheless, the question whether a certain article is "baggage" may be so free from doubt that the court will be able to pass on it as a matter of law. Thus it is clear that courts would hold as matter of law that articles carried by a passenger for the purpose of sale are not baggage. The Texas court of appeals has declared the rule to be that whether certain classes of articles carried by passengers on journeys should be included within the term or not is a question of law for the court; but when the question is as to the quantity of the articles generally coming under that denomination, then it becomes a question of fact to be found by the jury.[3]

§ 589. SAME—WEARING APPAREL.

Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is used in law, for which the carrier is responsible as carrier, depends upon the inquiry whether they are such, in quantity and value, as passengers under like circumstances ordinarily or usually carry for personal use when traveling. To the extent that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily and usually car-

[2] New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24. See, also, Mauritz v. Railroad Co., 23 Fed. 765.

[3] Jones v. Priester, 1 White & W. Civ. Cas. Ct. App. § 613.

ried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is liable as insurer.[1] Under this rule, the jury is warranted in finding that rare and valuable laces, carried in her trunks, on an extended journey over many lands, by a foreign noble woman, possessing large wealth, and enjoying high social position, and worn by her on different dresses when on visits, or frequenting theaters, or attending dinners, balls, and receptions, are baggage, for the loss of which the carrier is liable, even though their value is $10,000.[2] So the right of the traveler to recover from the carrier for lost baggage is not limited to such apparel or other articles as he expects to use by the way, but extends also to wearing apparel needed at the journey's end.[3] But it has been held that masquerade costumes, intended for use at a ball, form no part of a passenger's baggage.[4]

With respect to immigrants, such wearing apparel as

§ 589. [1] New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.

[2] New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, affirming 12 Blatchf. 484, Fed. Cas. No. 5,026; Id., 10 Blatchf. 16, Fed. Cas. No. 5,025.

[3] Dexter v. Railroad Co., 42 N. Y. 326. In this case it was said: "I think a young man, for instance, may start from his eastern home to remove to or take up his residence in a western state or city, and take with him his ordinary wearing apparel, though he might not need nor expect to use a single article of it by the way, except such as he wore upon his person. And I cannot admit that it would be a sound rule of law to hold that, if a gentleman from the interior of the state or country should purchase in New York, or in any other city, a new coat, or a new suit of clothes, for his own use, and put it in his trunk, he could not recover of the carrier for its loss because he did not expect to stop to wear it or put it on by the way."

[4] Michigan S. & N. I. R. Co. v. Oehm, 56 Ill. 293.

they have provided for their personal use, and as it would be necessary or reasonable for them to use after their arrival and settlement in this country, is baggage. So cloth not yet made into garments, but which they may have procured for manufacture into wearing apparel, and which they intend to make use of, to a reasonable amount, may properly be included as part and parcel of their wearing apparel.[5]

§ 590. SAME—HOUSEHOLD GOODS.

By the weight of authority, household goods, though carried in a passenger's trunk, are not baggage, for the loss of which the carrier is liable as insurer. Thus sheets, blankets, and quilts, carried in his trunk by a passenger changing his residence, and intended for use in his household when he should have provided himself with a home at his new place of residence, are not articles of baggage.[1] So the feather bed of an immigrant passenger, carried with her on a steamship across the Atlantic, and not intended for use on the voyage, is not baggage, for the loss of which the carrier is liable. It is an article of furniture, and it is difficult to see how it can any more properly be called personal baggage than any other article of household furniture.[2]

[5] Mauritz v. Railroad Co., 23 Fed. 765.

§ 590. [1] Macrow v. Railway Co., L. R. 6 Q. B. 611. A railroad company is not liable for the loss of household goods, such as window curtains, blankets, cutlery, books, ornaments, etc., even when these are packed in a trunk containing personal baggage. McCaffrey v. Railway Co., 1 Man. 350.

[2] Connolly v. Warren, 106 Mass. 146. A silk bedquilt, valued at $10, carried by a woman in her trunk, and not used on the journey,

But in the case of a steerage passenger bound to provide her bedding on a vessel during the voyage, that bedding constitutes a part of her ordinary baggage, which the passenger is justified and protected in carrying, and for which the carrier must pay, if lost.[3] The supreme court of Vermont has even held that a jury is warranted in finding that a bed, pillows, bolster, and bed quilts belonging to a poor man who is moving with his wife and family is baggage.[4] So the supreme court of Illinois has held that a jury is warranted in finding that a passenger traveling with his family may carry as baggage two feather beds and pillows, two coverlets, two bedspreads or blankets, an oilcloth table cover, one German silver teapot, one looking glass, one new double-barreled gun, one set of common dishes, two dozen German silver spoons, one serving box, six towels, together with considerable clothing; the whole worth $150.[5] But these two cases have been justly criticised as removing nearly all limitations as to what may be regarded as passengers' baggage.[6]

or necessary for her comfort, cannot be classed as baggage. St. Louis & C. R. Co. v. Hardway, 17 Ill. App. 321. "As to bedding and bed furnishings not intended for use on the journey, curtains, table cloths and covers, books, pictures, and albums, they come under the head of household goods, and not personal baggage, and cannot be recovered for." Mauritz v. Railroad Co., 23 Fed. 765.

[3] Hirschsohn v. Packet Co., 34 N. Y. Super. Ct. 522.

[4] Quimit v. Henshaw, 35 Vt. 604, 622.

[5] Parmelee v. Fischer, 22 Ill. 212.

[6] Hutch. Carr. § 684.

§ 591. SAME—TOOLS AND SURGICAL INSTRUMENTS.

A reasonable quantity of his tools is proper baggage for a mechanic traveling from place to place in search of work. What is such a reasonable quantity is a question for the jury.[1] Thus, a set of harness maker's tools, valued at $10, carried in a harness maker's trunk, with his clothing, while on a journey, are baggage, where it appears that harness makers customarily carry their tools with them when going from place to place.[2] So a carpenter may recover from a carrier the value of tools contained, with clothing, in his trunk, which has been lost by the carrier, the jury having found that they were the reasonable tools of a carpenter.[3]

Surgical instruments in the case of an army surgeon, traveling with troops, constitute part of his baggage.[4] And in Florida it has been held that whether or not a dentist's instruments, carried with him in his trunk while on a journey, are proper articles of baggage, is a question of fact for the jury.[5]

§ 591. [1] Kansas City, Ft. S. & G. R. Co. v. Morrison, 34 Kan. 502, 9 Pac. 225.

[2] Davis v. Railroad Co., 10 How. Prac. (N. Y.) 330.

[3] Porter v. Hildebrand, 14 Pa. St. 129. Night glasses or telescopes carried by a shipmaster are baggage, since he might reasonably have thought they would be useful to him during a voyage across the Atlantic. Cadwalleder v. Railroad Co., 9 L. C. R. 169. But in Bruty v. Railway Co., 32 U. C. Q. B. 66, it was held that a mechanic's tools were not baggage.

[4] Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262.

[5] Brock v. Gale, 14 Fla. 523.

§ 592. SAME—MANUSCRIPTS.

"With the lawyer going to a distant place to attend court, with the author proceeding to his publishers, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried as such in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle." [1] Hence it has been held that manuscript books, carried by a student in his trunk on a journey to his college, and necessary to the prosecution of his studies, are to be regarded as baggage.[2] And so is a traveling salesman's catalogue, a book prepared by himself for his personal use and convenience, and used by him in his business, and necessary to be carried in the discharge of his duties.[3]

But in England it has been held that ordinary luggage for which a railroad company is responsible does not include title deeds belonging to a client, which an attorney is carrying with him in his bag or portman-

§ 592. [1] Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692.

[2] Id.

[3] Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79; Gleason v. Transportation Co., 32 Wis. 85.

teau for the purpose of producing on a trial in a local court.[4]

§ 593. SAME—THEATRICAL PARAPHERNALIA.

Stage properties, costumes, paraphernalia, advertising matter, etc., carried by a theatrical company, are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of baggage.[1]

§ 594. SAME—JEWELRY.

Jewelry intended for the adornment of the person of a passenger is baggage when carried in a trunk during a journey. Thus diamonds and jewelry valued at from $1,300 to $1,500, contained in the trunk of a female passenger journeying to a summer resort, are articles of baggage, for the loss of which the railroad company is liable.[1] So a gold watch placed in his trunk by a passenger is baggage,[2] and so is an opera glass.[3]

[4] Phelps v. Railway Co., 19 C. B. (N. S.) 321, 34 Law J. C. P. 259. This decision may possibly be sustained on the ground that the papers did not belong to the passenger, but to a third person. See post, § 600.

§ 593. [1] Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230.

§ 594. [1] Coward v. Railroad Co., 16 Lea (Tenn.) 225.

[2] American Contract Co. v. Cross, 8 Bush (Ky.) 472; Jones v. Voorhees, 10 Ohio, 145; McCormick v. Railroad Co., 4 E. D. Smith (N. Y.) 181.

[3] Toledo, W. & W. Ry. Co. v. Hammond, 33 Ind. 379. Two gold chains, a locket, two gold rings, and a silver pencil case, con-

But jewelry and other costly articles not intended for use on the passenger's person are not baggage. Thus it has been held that a passenger who carries a watch on his person cannot recover the value of three or four others carried in his trunk, which were lost.[4] Neither is silverware contained in a passenger's trunk baggage,[5] nor are Centennial souvenirs.[6]

§ 595. SAME—BICYCLES.

A bicycle is a vehicle. From its nature, structure, and classification, the bicycle belongs to those things which are properly the subject of freight contracts, and is not embraced in the class of things denoted by the words "personal" or "ordinary" baggage.[1]

tained in a passenger's box, are baggage; but a concertina and a sewing machine are not. Bruty v. Railway Co., 32 U. C. Q. B. 66.

4 Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671.

5 Bell v. Drew, 4 E. D. Smith (N. Y.) 59.

6 Baker v. Railroad Co., 5 Wkly. Notes Cas. (Pa.) 292. A gold watch and chain valued at $471, gold ornaments for presents, valued at $450, and American coin to the amount of $60, carried in a passenger's trunk, were held not to be baggage in The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059. In Bomar v. Maxwell, 9 Humph. (Tenn.) 621, it was held that a watch, handcuffs, and locks were not baggage.

§ 595. 1 State v. Missouri Pac. R. Co., decided by the St. Louis court of appeals May 18, 1897, and not yet officially reported. The opinion of the court is given in 31 Am. Law Rev. 463. The court said, among other things: "We have not been cited to any authority from any source holding that a carrier must receive as ordinary baggage a vehicle or carriage, however variant its form."

§ 596. SAME—FIREARMS.

A revolver is included in personal baggage,[1] and so is a rifle carried in a passenger's trunk.[2] So guns for sporting purposes may be included in the baggage of a passenger from Europe to New York.[3] But the supreme court of Illinois has held that a Chicago grocer, who goes into the country in quest of butter, cannot claim as part of his baggage two revolvers. With due regard to the habits and conditions in life of the passenger, more than one revolver is not reasonably necessary for his personal use and protection.[4]

§ 597. SAME—DOGS.

A dog accompanying a passenger on a journey, it would seem, is not baggage. Regulations prohibiting passengers from taking dogs with them in passenger cars, and requiring extra payment for carrying dogs in baggage cars, are reasonable.[1] But where a railroad company permits its baggagemen to take charge of dogs for a fee to be paid to them personally, it is liable for the loss of a dog which was delivered by the baggageman to a person not the owner, at a station other than

§ 596. [1] Davis v. Railroad Co., 22 Ill. 278.

[2] Davis v. Railroad Co., 10 How. Prac. (N. Y.) 330. A pocket pistol and a dueling pistol in the carpetbag of a passenger are baggage. Woods v. Devin, 13 Ill. 746.

[3] Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453.

[4] Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212.

§ 597. [1] Gregory v. Railway Co. (Iowa) 69 N. W. 532.

that at which the dog was to be delivered.[2] But a railroad company is not liable for the safe transportation of dogs which were placed by a passenger in charge of the baggage master, to be carried in the baggage car, for a compensation paid the baggage master, after the passenger was informed by the ticket agent that the company did not transport dogs.[3]

The supreme court of Alabama has, however, held that a passenger on a railroad train, taking his dog with him on a hunt, who is required by the conductor to put him on the baggage car, may maintain an action against the company for the loss of the dog, which the baggage master refused to deliver at his destination without the payment of a small fee, and which was then carried on and lost; and a rule of the railroad company in reference to the carrying of dogs, requiring that they be placed in the baggage car, and allowing the baggage master a small charge for his care, is no defense to the action, when it is not shown that the passenger had notice or knowledge of it.[4]

§ 598. SAME—MONEY.

A proper sum of money, for traveling expenses and personal use while on the journey, contained in the trunk of a passenger, is to be considered as part of his baggage.[1] The question whether a particular sum of

[2] Cantling v. Railroad Co., 54 Mo. 385.

[3] Honeyman v. Railroad Co., 13 Or. 352, 10 Pac. 628.

[4] Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 10 South. 282.

§ 598. [1] Jordan v. Railroad Co., 5 Cush. (Mass.) 69; Davis v. Railroad Co., 22 Ill. 278; Bomar v. Maxwell, 9 Humph. (Tenn.) 620;

money ($218.60) carried by a passenger in his trunk is baggage is a question for the jury, and depends on the question whether such sum is a reasonable and proper

Whitmore v. The Caroline, 20 Mo. 513; Missouri Pac. Ry. Co. v. York, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 638; International & G. N. R. Co. v. McCown, Id. § 712; Merrill v. Grinnell, 30 N. Y. 594, 609; Torpey v. Williams, 3 Daly (N. Y.) 162; Duffy v. Thompson, 4 E. D. Smith (N. Y.) 178. These New York cases must be taken as overruling Grant v. Newton, 1 E. D. Smith (N. Y.) 95, which held that money in a passenger's trunk, though not exceeding an amount reasonably necessary for traveling expenses, is not baggage, since money is usually carried on the traveler's person. In Merrill v. Grinnell, 30 N. Y. 594, 609, Denio, J., said: "The reason why property of any kind is included in the contract of carriers of persons is that it is the universal or very usual concomitant of a journey, whether by land or water, for the traveler to take traveling conveniences along with him. In the infancy of society, and now among barbarous people, persons may perform journeys without a change of raiment, and may rely upon charity or rapine for the means of subsistence. But this is all different now with us; and men who engage in the business of transporting people from one part of the country, or of the world, to another, must make provision also for carrying whatever may be reasonably necessary to the traveler, under ordinary circumstances, for the prosecution of the journey, or they will be wholly without employment. Nothing, of course, can be more essential to this end than an adequate supply of money for traveling expenses; and the amount must necessarily be measured, not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey, and include such an allowance, for accident or sickness, and for sojournings on the way, as a reasonably prudent man would consider it necessary to make. Whether the amount claimed in the case of loss would be reasonable or excessive in a particular instance would depend upon the character of the journey and the special circumstances of the case. It is very clear that it would not include funds carried for the purpose of transportation or remittance, or for investment in another locality. It should be limited to money taken for traveling expenses, properly so called. When thus limited, the prin-

amount for plaintiff to carry for his journey, in view of his position and circumstances.[2]

But money intended for trade or business or investment or transportation, or any other purpose than as above stated, cannot be regarded as baggage.[3] Thus $11,000 in money carried in a passenger's trunk, as agent for a bank, is not baggage, and the carrier is not liable for the loss of the trunk by theft, if he had no notice of its contents.[4] Nor is the carrier liable for the loss of $4,000 in gold contained in the trunk of a passenger, where the contents were not made known to the carrier or his agents, nor paid for as freight, but put aboard the conveyance by the passenger as baggage, and so treated by himself on the journey.[5] So the purchase of a railroad ticket does not give the purchaser a right to carry with him in the passenger car over $90,000 in gold coin, weighing between two and three hun-

ciple does not involve any departure from the rule that the liabilities of the carrier are imposed in respect to the compensation paid, but it is in strict accordance with that principle." In this case $800 was held not an unreasonable amount for a passenger from Germany, intending to go, via New York, to San Francisco.

2 Fairfax v. Railroad Co., 73 N. Y. 167, affirming 43 N. Y. Super. Ct. 18; Id., 67 N. Y. 11, reversing 40 N. Y. Super. Ct. 128, 37 N. Y. Super. Ct. 516.

3 Jordan v. Railroad Co., 5 Cush. (Mass.) 69. Money belonging to a passenger on a railroad, and intended for trade, business, or investment, or transportation, and not for the use of the passenger while traveling, is not luggage, within Civ. Code Cal. § 2181, which defines luggage as any article for the use of the passenger while traveling, or for his personal equipment. Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. 686.

4 Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85.

5 Doyle v. Kiser, 6 Ind. 242.

dred pounds, nor does it give him the right to travel in the baggage or express car for the purpose of transporting such money.[6] So it has been held that bank notes, to a considerable amount, carried by an attorney for the purpose of meeting the exigencies of a case about to be tried, are not baggage.[7]

§ 599. SAME—DUTY TO DISCLOSE VALUE.

Where articles in a passenger's trunk are in fact baggage, within the rules heretofore laid down, no obligation rests on him to disclose their value, in the absence of statutory provisions, or of any regulations by the carrier requiring such disclosure. On this subject the supreme court of the United States has said: "In the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject, by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the ar-

[6] Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. 686. The fact that such passenger is a county treasurer, charged with the public duty of carrying the money to the state treasurer, does not alter the rule, though the railroad company had for many years previously acquiesced in such practice, and accepted him as passenger, with knowledge that he had the money with him. Nor is such county treasurer a public messenger, within the meaning of Act Cal. April 4, 1864, requiring the Central Pacific Railroad to carry such passengers over its road free of charge. Id. $87,000 in gold, silver, ore, and bullion, is not baggage, which a passenger is entitled to have carried free of charge; and, if he takes such an amount of money on a train with him, the company is entitled to ask and to receive the regular freight rate on such property. Hutchings v. Railroad, 25 Ga. 61.

[7] Phelps v. Railroad Co., 19 C. B. (N. S.) 321, 34 Law J. C. P. 259.

ticles carried, under the name of baggage, for his personal use and convenience when traveling; and in the absence of conduct upon the part of the passenger, misleading the carrier as to the value of his baggage,—the court cannot, as matter of law, declare that the mere failure of the passenger, unasked, to disclose the value of his baggage, is a fraud upon the carrier, which defeats all right of recovery." [1]

§ 600. SAME—PROPERTY OF THIRD PERSONS.

Since the term "baggage" includes only such articles as are reasonably necessary for the comfort and convenience of the passenger, it follows that the carrier is not responsible as insurer for the property of third persons carried by the passenger. Thus a carrier is not liable for the loss of a passenger's money which he put into the valise of a fellow passenger, who delivered the valise containing such money, together with his own, and also his wearing apparel, into the carrier's custody.[1] So the owner of a portmanteau, who allows his servant to carry it by train as his own, the servant taking and paying for his ticket, and the owner traveling, not on that train, but on a later one, cannot maintain an action against the company for the loss of the portmanteau.[2]

§ 599. [1] New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.

§ 600. [1] Dunlap v. Steamboat Co., 98 Mass. 371.

[2] Becher v. Railway Co. (1870) L. R. 5 Q. B. 241. But in Meux v. Railway Co., 14 Reports, 620, it was held that a master could maintain an action of tort where his property, though transported as the baggage of his servant, is injured by the negligence of the railway company while in its custody.

So ladies' jewelry carried by a man in his trunk is not part of his baggage, though not intended for trade, gift, or speculation; and the carrier is not liable for its loss, if it had no knowledge of the contents of the trunk.[3] Nor is a sacque, muff, and silver napkin ring baggage when carried in the trunk of a gentleman traveling alone.[4] Neither are presents intended for friends, and Masonic regalia and engravings.[5]

§ 601. SAME—PASSENGER TO ACCOMPANY.

It would seem that it is implied in the contract of carriage that the baggage and the passenger go together. The fare paid by the passenger to the carrier is the compensation for his carriage, and for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. For personal wearing apparel subsequently forwarded by his direction the carrier is not liable as a carrier of baggage, in the absence of any special agreement.[1] It has been held, however, that where a passenger who has paid his fare is unable to procure his baggage in time to be transported on his train, and the station agent agrees to forward it on the next train, the company is liable for the safety of the baggage as com-

[3] Metz v. Railroad Co., 85 Cal. 329, 24 Pac. 610.

[4] Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510.

[5] Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225. A "spring horse," weighing 78 pounds, and measuring 44 inches in length, is not luggage, though not intended as merchandise, but purchased by the passenger as a present for a child. Hudston v. Railway Co. (1869) L. R. 4 Q. B. 366.

§ 601. [1] Wilson v. Railway, 56 Me. 60.

mon carrier after it receives the baggage and undertakes to transport it.[2] So it has been held that a railroad company is not bound to transport baggage on the train on which the passenger takes passage, but its obligation is to ship the baggage within a reasonable time after it has been received and checked.[3] So the fact that a husband is obliged to leave the baggage for himself and family in charge of his wife, and that he takes a different train from the one transporting them and the baggage, does not deprive it of its character as baggage, so as to prevent his suing for its loss. The relationship existing between husband and wife is of such an intimate and confidential character that she may properly be regarded as representing him under the circumstances.[4]

But the authorities which deny that a trunk is baggage when not accompanied by the passenger hold that

[2] Warner v. Railroad, 22 Iowa, 166. The fact that a passenger does not ride on the train on which his baggage is being transported does not relieve the company from liability for its loss. Logan v. Railroad Co., 11 Rob. (La.) 24. A steamboat is liable for the loss of baggage, though the passenger did not accompany it. Block v. The Trent, 18 La. Ann. 664. Under 7 & 8 Vict. c. 85, amending 5 & 6 Vict. c. 55, § 20, which requires railroad companies to carry officers and soldiers of the army, with their luggage, stores, etc., and which fixes the compensation for "public luggage" so carried at two pence per ton per mile, the railroad company is bound to carry the public luggage of a battalion at those terms, though only a few of the soldiers accompany it, and no matter what may be the disproportion between the amount of luggage and the number of the forces in charge of it. Attorney General v. Great Southern & W. Ry. Co., 14 Ir. C. L. 447.

[3] St. Louis S. W. Ry. Co. v. Ray (Tex. Civ. App.) 35 S. W. 951.

[4] Curtis v. Railroad Co., 74 N. Y. 116.

the reception of the trunk for transportation in such a case imposes on the company the obligation of a common carrier of merchandise. The fact that no freight is paid on receipt of the trunk is immaterial, since the company has the right to charge freight, and detain the trunk until it is paid.[5] Since the liabilities of a common carrier of merchandise are in the main identical with those of a common carrier of baggage, it is not of vital importance in which light personal effects not accompanied by the passenger are regarded.

However, this principle applies only when the passenger acts in good faith, and himself takes passage over the carrier's route. A railroad company which accepts baggage checked over its road by a connecting line, under the belief that the passenger continues his journey over its line, is not liable for the baggage as a common carrier where the passenger, instead of so doing, completes his journey over a rival line. In such a case the company is not liable even as a gratuitous

[5] Wilson v. Railway Co., 57 Me. 138; Graffam v. Railroad Co., 67 Me. 234; Flaherty v. Greenman, 7 Daly (N. Y.) 481. Where a passenger's baggage fails to arrive in season to be shipped on the vessel on which he takes passage, and he sails without it, and it is put on board another vessel, a receipt or bill of lading being given for it by the master of another vessel, the case is one of the ordinary shipment of goods as freight, for whose safe delivery the vessel is liable, and her owner is not to be regarded merely as a gratuitous bailee. The Elvira Harbeck, 2 Blatchf. 336, Fed. Cas. No. 4,424. If a trunk is deposited with a carrier without being accompanied by a passenger, it is received as freight, and is liable to the payment of ordinary charges, and notice of its delivery to the carrier and of acceptance must be given, according to the rules of law, before any liability can attach in case of loss. Wright v. Caldwell, 3 Mich. 51.

bailee, and it can be held liable only in case it willfully destroys the property.[6]

§ 602. MERCHANDISE.

A common carrier is not liable for the loss of merchandise delivered to it by a passenger as his personal baggage, without notice that the trunk contained merchandise.[1] "If the owner undertakes to carry merchandise in the character of baggage, or to conceal money in other parcels, and thus deprive the carrier of his just compensation, such merchandise or money must be at his own risk, unless lost or injured by the wrongful act of the carrier, because they are carried without that reward which is the foundation of the carrier's contract to insure, and which ought in justice to be in proportion to the risk." [2]

On the same principle, and for the same reason, samples of merchandise carried by a traveling salesman in his trunk, with a view of enabling him to make bar-

[6] Beers v. Railroad Co., 67 Conn. 170, 34 Atl. 541.

§ 602. [1] Great Northern Ry. Co. v. Shepherd (1852) 8 Exch. 30; Cahill v. Railway Co. (1861) 10 C. B. (N. S.) 154, affirmed on appeal 13 C. B. (N. S.) 818; Belfast & B. Ry. Co. v. Keys, 9 H. L. Cas. 556; Shaw v. Railway Co., 7 U. C. C. P. 493; Hamilton v. Steamship Co., 2 Russ. & C. 352; Collins v. Railroad, 10 Cush. (Mass.) 506; Strouss v. Railway Co., 17 Fed. 209; Simpson v. Railroad Co. (Sup.) 38 N. Y. Supp. 341. A carrier of passengers for hire is bound to carry only their personal baggage. Therefore, if a passenger deliver to the carrier as baggage a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier has no notice, the carrier is not liable for its loss, in the absence of negligence. Haines v. Railway Co., 29 Minn. 160, 12 N. W. 447.

[2] Smith v. Railroad, 44 N. H. 325.

gains for the sale of goods, are not baggage.[3] A traveler who presents to a carrier of passengers a trunk or valise, such as is commonly used for the transportation of wearing apparel, represents by implication that it contains only such articles as are necessary for his comfort and convenience on the journey; and if, in fact, it contains merchandise, the traveler is guilty of such fraud as to absolve the carrier from the extraordinary liability of insurer. Hence the carrier is not liable for the loss of $30,000 worth of jewelry carried by a commercial traveler in his trunk.[4]

§ 603. SAME—CUSTOM AND USAGE.

The responsibility as insurer in respect to merchandise carried as baggage cannot be created by mere evidence of a custom of passengers to take with them, and

[3] Hawkins v. Hoffman, 6 Hill (N. Y.) 586. A railroad company is not liable as insurer for the loss of the trunk of a commercial traveler containing samples of merchandise owned by his employers, and which it checked as the baggage of such agent. Alling v. Railroad Co., 126 Mass. 121; Stimson v. Railroad Co., 98 Mass. 83; Southern Kan. Ry. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; Pennsylvania Co. v. Miller, 35 Ohio St. 541; Talcott v. Railroad Co., 66 Hun, 456, 21 N. Y. Supp. 318.

[4] Michigan Cent. R. Co. v. Carrow, 73 Ill. 348. The presentation of a trunk by a passenger to a railroad company, to be checked, amounts to a representation that its contents are personal baggage; and, if it contains a valuable stock of jewelry, the company will not be liable for its loss if the passenger did not inform the baggage agent as to the actual contents of the trunk, and the baggage agent did not know what the trunk contained. Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711. A traveling salesman's trunk, containing jewelry valued at over $20,000, does not become baggage by being received and checked as such, if the railroad company had no knowl-

of railroad corporations to carry, similar packages as personal baggage, or by evidence that the package, delivered by the passenger as baggage, is of such form or appearance as to raise a doubt or suspicion or inference that it contains merchandise.[1] The baggage agent will not be charged with knowledge of the contents of a trunk from the mere fact that it is of a kind known as a jeweler's trunk, and that it has been the custom for jewelry merchants to have such trunks checked as personal baggage of their agents, where there is no evidence that the railroad companies or their agents knew what the trunks contained.[2] It has even been held that the fact that commercial travelers or others are accustomed to carry merchandise in passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carriers, will not render them liable for such merchandise. The travelers carry such merchandise at their own risk. The established rule of law, which limits the responsibility of the carrier, upon the contract implied by a sale of a ticket to the passenger, to the proper personal baggage of such passenger, cannot be annulled, and the liability of the

edge of its contents. And if an accident happens to a train, and the trunk and part of its contents are lost and destroyed, the railroad company does not become guilty of a conversion of the rescued articles, delivered by the traveling man to the conductor, by a refusal to deliver them to him when he makes a demand on it for his baggage in its original form; the only duty imposed on the company with respect to them being to keep them safely and return them to their owner on demand and identification. Wunsch v. Railroad Co., 62 Fed. 878.

§ 603. [1] Blumantle v. Railroad Co., 127 Mass. 322.

[2] Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, reversing 39 Fed. 417.

carrier enlarged, without proof of an agreement to that effect entered into by the carrier.[3] So the fact that other baggage masters had checked a valise, knowing it to contain merchandise, does not render the company liable for its loss on a trip where the passenger had it checked as baggage without informing the baggage master of its contents.[4]

§ 604. SAME—CARRIER'S DUTY TO INQUIRE.

The carrier is not bound to inquire as to the nature of the contents of a trunk or valise delivered to it by the passenger for transportation, but has a right to assume that it consists only of the personal baggage of the passenger.[1] This rule would seem to hold, even where the package has the appearance of being likely to contain merchandise.[2] A distinction exists in this re-

[3] Alling v. Railroad Co., 126 Mass. 121.

[4] Blumenthal v. Railroad Co., 79 Me. 550, 11 Atl. 605.

§ 604. [1] Haines v. Railway Co., 29 Minn. 160, 12 N. W. 447; Doyle v. Kiser, 6 Ind. 242.

[2] Cahill v. Railway Co., 10 C. B. (N. S.) 154, affirmed on appeal 13 C. B. (N. S.) 818. In this case, Erle, C. J., said: "It seems to me that it would be introducing a most pernicious rule to hold that, if a package which from its appearance is likely to contain merchandise is brought to a railway by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood to be luggage, or merchandise, at the peril of being liable for a loss, if loss occurs. * * * It is said that plaintiff had no express notice that he ought to have paid for the carriage of this box; but, on the other hand, the defendant had no express notice that it contained merchandise for which they were entitled to charge, and not personal luggage. What is the contract into which the railway company enter when they receive a passenger with his luggage? Is it a contract to carry him safely, together with anything which he may choose to bring with

spect between carriers of freight and carriers of passengers and their baggage. "Carriers of freight receive all kinds of packages, some valuable and others of trifling value. This fact has been held to impose on them the duty in all cases, in the absence of fraud and deceitful practices, to inquire of the shipper as to the contents of the package, if they would protect themselves in the carriage of valuable freights. It is their duty to receive all kinds of freight, whether of great value or otherwise. The shipper is not bound, in the first place, to disclose the nature of the contents of the package, unless he is inquired of concerning it. * * * But the rule is different in regard to the baggage of a traveler. As we have seen, the fact the traveler presents a parcel as baggage, whether contained in a trunk or a satchel, or other convenient mode of carrying baggage, it is upon the implied representation it contains only baggage, and the carrier is not bound to inquire as to its specific contents. There is no reason for the adoption of any other rule. No considerations of public convenience require it. By common custom, the personal baggage of the traveler is carried without extra charge. Passenger carriers do not assume to carry anything as baggage except such things as may be necessary to the convenience and comfort of the traveler, and perhaps sufficient money to defray the expenses of the journey. This fact is well known to all persons who seek passage in railway carriages. With a great majority of travelers, the amount of baggage

him and pass off as luggage, when in truth it is not luggage, but merchandise? I think there was no such contract."

carried is of inconsiderable value. The companies have no arrangements for the carrying and safe-keeping of costly articles. The contract is simply for passage, and the usual personal baggage, not exceeding in weight the amount prescribed by the regulations of the company. If this implied contract with the carrier of passengers is to be varied, modified, or enlarged, it must be by direct notice of the contents of the package offered as baggage, which, in effect, would amount to a special contract. The company may rely upon the representation that whatever is offered as baggage is that, and nothing else." [3]

But it has been held by the court of civil appeals of Texas that the size and character of a commercial traveler's trunk are sufficient to put a baggage agent who makes an extra charge for overweight on inquiry as to its contents; and if no inquiry is made, and the passenger resorts to no concealment or fraud, the carrier is liable for the merchandise contained therein.[4]

§ 605. SAME—PAYMENT OF EXTRA COMPENSATION.

The rule supported by the weight of authority and of reason is that the payment of an extra charge for extra baggage does not make the company liable for the loss of articles not properly baggage, where such payment is made wholly on account of the excess in the amount of the articles, and not at all on account of the

[3] Michigan Cent. R. Co. v. Carrow, 73 Ill. 348.

[4] Ft. Worth & R. G. Ry. Co. v. I. B. Rosenthal Millinery Co. (Tex. Civ. App.) 29 S. W. 196. See, also, post, § 606.

character of the articles.[1] Nor is a railway company liable for the loss of an emigrant's box, containing only merchandise, though he offered to pay for its transportation, if it had no knowledge of the contents of the box, and assumed that they were the personal baggage of the passenger.[2] In opposition to these cases, it has been held, however, that where a passenger pays for the extra weight of his baggage, which includes a trunk containing $2,000 in silver coin, and also wearing apparel, the carrier is liable for the loss of the coin in transit, though it had no knowledge of the contents of the trunk.[3] So it has been held that a carrier of passengers who, in addition to passage money, demands and receives from a passenger compensation as freight for the transportation of packages containing merchandise and baggage, is liable, in case of loss, for the merchandise as well as the baggage, in the absence of fraud or concealment on the part of the passenger as to the contents of the packages.[4]

Unquestionably, a railroad company which receives the trunk of a passenger, after being advised that it contains articles of merchandise in addition to ordinary baggage, and charges and receives for its transportation, because of extra weight, a sum in addition to the

§ 605. [1] Spooner v. Railroad Co., 23 Mo. App. 403; Cincinnati & C. A. L. R. Co. v. Marcus, 38 Ill. 219; Berley v. Newton, 10 How. Prac. (N. Y.) 490.

[2] Lee v. Railway Co., 36 U. C. Q. B. 350.

[3] Baldraff v. Railroad, Fed. Cas. No. 794; Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67.

[4] Stoneman v. Railway Co., 52 N. Y. 429, affirming 1 Buff. Super. Ct. 286.

ordinary fare, is liable for the merchandise as well as for the baggage in case of failure to deliver.[5] So gold dust carried surreptitiously by a stage passenger is not baggage, for the loss of which the carrier is liable; but if the carrier learns of the fact, and charges for carrying the articles as extra baggage, then the carrier is liable for the value of the articles in case of loss.[6] So, in the case of an immigrant who carries with her trunks and other ordinary baggage, and who also turns over to the carrier a number of boxes of goods for transportation, and who pays freight for the weight in excess of her baggage allowance, it would be unjust to presume conclusively that the entire shipment was as baggage, and that there could, in case of loss, be no recovery except for such articles contained in the boxes as would properly be designated as necessary baggage.[7]

[5] Perley v. Railroad Co., 65 N. Y. 374; Sloman v. Railway Co., 67 N. Y. 208, reversing 6 Hun (N. Y.) 546; Glasco v. Railroad Co., 36 Barb. (N. Y.) 557. But it has recently been held by the supreme court of New York that where the samples of a commercial traveler are checked as baggage on a railroad over which he takes passage, the mere fact that he paid an excess baggage charge demanded because the weight of the trunks exceeded the limits fixed for free transportation, and that he informed the baggage agent that the trunks contained samples, does not show that the company undertook to carry such samples as freight, so as to render it liable to the owner for their loss or destruction, in the absence of any showing that it or its agents were informed that the samples were owned by any one else than the passenger. Talcott v. Railroad Co., 66 Hun, 456, 21 N. Y. Supp. 318.

[6] Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340.

[7] Hamburg-American Packet Co. v. Guttman, 127 Ill. 598, 20 N. E. 662. Where a station agent receives a trunk as baggage, with knowledge that it contains a stock of jewelry, and without any concealment

§ 606. SAME—KNOWLEDGE OF CARRIER.

While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault.[1] Where a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to any one concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his baggage, and

practiced by the passenger as to the contents of the trunk or its value, he is not estopped from demanding full compensation for the trunk and its contents, as though the contents were in fact ordinary baggage, and not merchandise. Jacobs v. Tutt, 33 Fed. 412.

§ 606. [1] Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230; Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762; Lake Shore & M. S. Ry. Co. v. Hochstim, 67 Ill. App. 514. Where a passenger, intending to deceive the railroad company, carries merchandise as baggage, he cannot, in case of loss, recover from the company as a common carrier; but where the company, knowing it to be merchandise, permits it to be treated as baggage, the fact that it is merchandise will not prevent a recovery. Ross v. Railroad Co., 4 Mo. App. 583. A railroad company which, with knowledge of its contents, takes upon a freight car, as passenger's baggage, a sample trunk containing valuable merchandise, is liable for its loss while in transit. But the company is not liable as a carrier, if the passenger, finding that the trunk is too large to be put in the caboose, on his account and responsibility, and not as a delivery to a common carrier, places it in a box car, the company having no knowledge as to its character and contents. Rider v. Railway Co., 14 Mo. App. 529.

the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them that way.[2] Thus, where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practiced or attempted on its employés (such as buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures), and for the transportation of which and of the passenger a lump sum is paid, it assumes with reference to the property the liability of a common carrier of merchandise.[3]

Both parties will be estopped from denying that merchandise is baggage, if it was checked as baggage, and accepted as such by the company, with knowledge of the facts. Hence, where, in such a case, the railroad company affords the traveler a reasonable opportunity to get the trunks on their arrival at destination, and then stores them in its baggage room, where they

[2] Kansas City, Ft. S. & M. Ry. Co. v. McGahey (Ark.) 28 S. W. 659. Hence, where a passenger, traveling with his family, delivers to the carrier as baggage two trunks and three boxes, containing, besides wearing apparel, household goods and tools, the carrier is liable for all the property as merchandise, if it accepts and checks the same. The effects contained in the boxes were packed in such a manner as to indicate that they were not carried as necessary personal baggage to be used on the journey, but as merchandise would be when it reaches the place of destination. Id.

[3] Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262.

are destroyed by fire two days later, its liability is that of a warehouseman, and not of a common carrier of freight.[4]

As to the implied or apparent authority of a baggage master to accept merchandise as baggage, the authorities are not quite uniform. In Massachusetts it is held that he has no such authority. The fact that a baggage master knows that a bundle checked by him for a passenger as baggage is in fact merchandise, and that similar articles of merchandise had theretofore been checked for other passengers as merchandise, does not make the railroad company liable for it as a common carrier of baggage, in the absence of an agreement that it should be carried as freight, or that the baggage master had authority to receive freight to be carried on a passenger train, or to bind the corporation to carry merchandise as personal baggage.[5] But the weight of authority is that if the baggage agent of the company, at the time he received the baggage and gave a check for it, had knowledge that the baggage contained merchandise, and received it, without objection, as baggage, and placed it on the train, the company is liable for the merchandise as baggage.[6] So, where a passenger is ignorant of the rules of a railroad company forbidding its agents to receive money as baggage, and delivers to a baggage agent more mon-

[4] Hoeger v. Railroad Co., 63 Wis. 100, 23 N. W. 435.

[5] Blumantle v. Railroad Co., 127 Mass. 322.

[6] Bowler & Burdick Co. v. Toledo & O. C. Ry. Co., 10 Ohio Cir. Ct. 272; Toledo & O. C. R. Co. v. Aubach, Id. 490. See, also, Jacobs v. Tutt, 33 Fed. 412.

ey than the carrier is required to transport as baggage, and informs the agent of the amount, the carrier's common-law liability as insurer will attach.[7]

§ 607. RIGHTS OF PASSENGER AS TO PROPERTY NOT BAGGAGE.

The fact that some of the articles in a trunk are not baggage does not bar a recovery for such as are baggage.[1]

As to the duty of the carrier in respect to articles not baggage, the authorities are conflicting. The weight of authority, however, is in favor of this proposition: Although the carrier is not liable as insurer for the loss of merchandise carried as baggage, he is liable as bailee without reward for loss or injury caused by his gross negligence; but such negligence must be proved,

[7] Railway Co. v. Berry, 60 Ark. 433, 30 S. W. 764. The court said: "The baggage master is not out of the scope of his employment when he receives more money for transportation as baggage than by the rules of the company or instructions from his employer he is authorized to receive; for the carrier does carry some money as baggage, and the agent whose business it is to receive and check baggage has the implied authority, by virtue of the nature of his employment and the duties incident to it, to bind his employer, the carrier."

§ 607. [1] Dibble v. Brown, 12 Ga. 217; Spooner v. Railway Co., 23 Mo. App. 403; Bruty v. Railway Co., 32 U. C. Q. B. 66. But in The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059, it was held that a passenger who, on leaving a vessel at quarantine, informs the captain that his trunk contains only clothing, when it contains in addition jewelry and coin, is guilty of dishonesty, and cannot recover even the value of his proper baggage in the trunk. If the truth had been stated, the captain might, and probably would, have protected his vessel from loss by putting the trunk in a place of security.

and is not to be presumed from the mere fact of loss.[2] The supreme judicial court of Massachusetts, however, has held that the carrier is not liable at all, not even for gross negligence, for the loss of any articles not baggage. "He did not agree to receive and transport money beyond a certain amount, or merchandise of any kind; and he cannot be held liable for any, even the smallest, degree of care, for that which he did not agree to take into his possession and keeping." [3]

On the other hand, it has recently been held in England that, where property is rightfully on the premises of a railroad company, it is bound to exercise care for its safety. Thus, where part of the ordinary luggage of a servant which he is taking with him as a passenger by railway is the property of the master, and it is injured while in the custody of the railway company by its misfeasance,—as by being negligently overturned in front of a train at a station,—the master can maintain an action of tort against the company for the amount of the damage, notwithstanding that the contract of carriage is with the servant alone.[4] So it has

[2] Smith v. Railroad, 44 N. H. 325; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Bowler & Burdick Co. v. Toledo & O. C. Ry. Co., 10 Ohio Cir. Ct. 272, 282. A carrier is not liable for the loss of merchandise carried without its knowledge in the trunk of a passenger, even if the loss was caused by its negligence. Gurney v. Railway Co., 59 Hun, 625, 14 N. Y. Supp. 321, affirmed 138 N. Y. 638, 34 N. E. 512. But see Toledo & O. C. Ry. Co. v. Ambach, 10 Ohio Cir. Ct. 490, where it was held that the carrier is bound exercise ordinary care in respect to such property.

[3] Dunlap v. Steamship Co., 98 Mass. 371.

[4] Meux v. Railway, 14 Reports, 620.

been held in Ohio that the carrier, by taking property not baggage into his charge, and putting it into his warehouse for safe-keeping, assumes the relation to it of an ordinary bailee, and he is bound to take such care of the property as a man of ordinary prudence would of his own, under the circumstances.[5]

§ 608. DURATION OF LIABILITY AS INSURER.

The liability of a common carrier as insurer of the passenger's baggage attaches on the delivery of the baggage to it for transportation, within a reasonable time before the departure of the next conveyance for the passenger's destination, and continues, not only during the transportation, and until the arrival of the baggage at destination, but until the passenger has had a reasonable opportunity to remove it.

§ 609. WHEN LIABILITY BEGINS.

A common carrier is liable for baggage from the time when it is delivered to him for transportation by a passenger who intends to proceed with the next conveyance departing to his destination.[1] Hence, where a passenger, at about noon, delivers his baggage to a carrier, whose conveyance, a steamboat, leaves at 6 o'clock on the following morning, the carrier is liable

[5] Pennsylvania Co. v. Miller, 35 Ohio St. 541.

§ 609. [1] Camden & A. R. & Transp. Co. v. Belknap, 21 Wend. (N. Y.) 353; Woods v. Devin, 13 Ill. 746; Shaw v. Railroad Co., 40 Minn. 144, 41 N. W. 548.

for the safety of the baggage while so in his custody.[2] The fact that, for the convenience of the carrier, the passenger consents to some delay, and to its storage in the baggage room, where it is destroyed by fire on the following day, does not take away the liability as common carrier.[3]

But where the owner of a trunk leaves it with the freight agent for storage over night at the freight depot, intending the next day to take it to the passenger depot, some distance away, and to have it checked as baggage, the company is not liable as common carrier for the trunk while so stored; and, since it received no compensation for the storage in the freight depot, it was merely a gratuitous bailee, liable only for gross negligence.[4]

§ 610. SAME—NOTICE TO CARRIER.

It would seem that notice in some form must be given the carrier of the delivery of the baggage to it. But, with the assent of a common carrier, the baggage of travelers may be left at a railway station without notice to it or its agents; and such assent may be implied from the course of business or custom of the car-

[2] Camden & A. R. & Transp. Co. v. Belknap, 21 Wend. (N. Y.) 353. But in Goodbar v. Railway Co., 53 Mo. App. 434, it was held that a carrier is liable as carrier only for passenger's baggage which is left with him for immediate transportation; and, where baggage is deposited at the depot in the evening for transportation the next morning, the liability for its destruction by fire during the night is merely that of a warehouseman.

[3] Shaw v. Railroad Co., 40 Minn. 144, 41 N. W. 548.

[4] Van Gilder v. Railroad Co., 44 Iowa, 548.

rier.[1] Where there is evidence as to the existence of such a custom, the question whether or not it has been established is for the jury.[2] An expressman's act in leaving a passenger's trunk at a station, and in calling the attention of the station agent to it, coupled with the station agent's reply that it is "all right," and the giving of directions to some men to take care of it, constitute a sufficient delivery to charge the company with liability.[3]

§ 611. SAME—PURCHASE OF TICKET.

The fact that the passenger has not purchased a ticket when baggage is delivered to the carrier to be transported a few hours later does not relieve it from responsibility as a common carrier of baggage. To render the carrier liable for the baggage, the owner need not have placed himself in such situation that he cannot withdraw the baggage. The question of liability is determined by the intention of the owner at the time he places his baggage in the hands of the carrier's servants.[1] There is no reason why railway companies may not receive baggage in advance of the train upon which it is to be transported, and in advance of the purchase of a ticket or the payment of fare by the owner, and thus become liable for its loss. They undoubtedly have the right to make reasonable rules and

§ 610. [1] Green v. Railroad Co., 38 Iowa, 100.

[2] Green v. Railroad Co., 41 Iowa, 410.

[3] Rogers v. Railroad Co., 1 Thomp. & C. (N. Y.) 396; Id., 2 Lans. (N. Y.) 269.

§ 611. [1] Green v. Railroad Co., 41 Iowa, 410.

regulations; and a rule that a person intending to become a passenger shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage is undoubtedly a reasonable regulation, as such a regulation secures good faith and fair dealing. But if the company adopts no such rule, or if, having adopted, it adopts a practice or custom to the contrary, or if, notwithstanding such a rule, it receives a person's trunk as baggage, trusting to his honesty to purchase a ticket or passage upon the train upon which the trunk is to go, it will be liable for its loss, whether that loss occurs before or after the arrival and departure of the train, or before or after the purchase of a ticket or payment of fare.[2]

§ 612. SAME — AGENT'S AUTHORITY TO RECEIVE BAGGAGE.

A baggage agent acts within the scope of his apparent authority in receiving baggage, and hence the company is bound by his act in receiving it in advance of the time permitted by a rule of the company, if the passenger was ignorant of the existence of the rule.[1] So, where a passenger intrusts baggage to a porter at a railway station some 10 minutes before the arrival of the train, while she goes to the ticket office, the jury is justified in finding that the porter was acting within the scope of his authority as a servant of the railway company in receiving the baggage, and that it was not

[2] Lake Shore & M. S. Ry. Co. v. Foster, 104 Ind. 293, 4 N. E. 20.

§ 612. [1] Lake Shore & M. S. Ry. Co. v. Foster, 104 Ind. 293, 4 N. E. 20.

intrusted to him personally to take care of it until the arrival of the train, in which latter event the company would not be liable for its theft by the porter.[2] A notice by the company requiring passengers to deposit in the cloak room any articles which they desire to leave at the station does not apply to such a case.[3] But where a passenger misses his train, and leaves his luggage on the platform in charge of a porter, saying that he would travel by the next train, which is to start in an hour, and then leaves the station, and goes into the billiard room of an hotel for the interval, the luggage is not in charge of the porter in behalf of the company for carriage, but is watched by him on his own responsibility, and hence the company is not liable for its loss while thus in the porter's possession.[4]

§ 613. TERMINATION OF LIABILITY.

A carrier's liability, as such, for a passenger's baggage, continues during transportation, and for such a time thereafter as affords the passenger a reasonable

[2] Great Western Ry. Co. v. Bunch (1888) 13 App. Cas. 31, affirming 17 Q. B. Div. 215.

[3] Lovell v. Railway Co., 45 Law J. Q. B. 476. A passenger handed his bag to a porter at a railway station, stating his destination, but directing the porter not to label it, as he would take it with him in the carriage. The passenger then went to get his ticket, and on his return the luggage was missing. Held, that there was evidence to go to the jury that the bag was intrusted to the servant of the railway company to be carried as passenger's luggage, and that a nonsuit was error. Leach v. Railway Co., 34 Law T. (N. S.) 134.

[4] Welch v. Railway Co., 34 Wkly. Rep. 166.

opportunity to remove it.[1] This is the rule, not only in this country, but also in England, and in all the British possessions. It is the duty of a railway company, with regard to the baggage of a passenger which travels on the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery on the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed the owner to do so.[2]

In Illinois it is held that the liability of a railroad company as common carrier for a passenger's baggage does not cease after the passenger has had a reasonable time to remove it, unless the company stores it in a safe and secure place, under charge of competent and lawful servants.[3] But, as we shall hereafter see, the

§ 613. [1] Dininny v. Railroad Co., 49 N. Y. 546; Mortland v. Railway Co., 81 Hun, 473, 30 N. Y. Supp. 1021; Cary v. Railroad Co., 29 Barb. (N. Y.) 35; Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510; Chicago & A. R. Co. v. Addizoat, 17 Ill. App. 632; Louisville, C. & L. R. Co. v. Mahan, 8 Bush (Ky.) 184; Mote v. Railroad Co., 27 Iowa, 22.

[2] Patscheider v. Railway Co. (1878) 3 Exch. Div. 153; Firth v. Railroad Co., 36 Wkly. Rep. 467; Vineberg v. Railway Co., 13 Ont. App. 93; Penton v. Railway Co., 28 U. C. Q. B. 367; Brown v. Railway Co., 3 Man. 496. But in Richards v. Railway Co. (1849) 7 C. B. 839, it was held that the liability of the carrier of a passenger's luggage continues until its delivery to the passenger at destination; and where the carrier's servant undertakes to make a delivery by carrying the luggage from the railway carriage to a hackney coach hired by the passenger, the liability continues until the baggage is in the coach.

[3] St. Louis & C. R. Co. v. Hardway, 17 Ill. App. 321; Bartholomew v. Railroad Co., 53 Ill. 227; Chicago, R. I. & P. R. Co. v. Fairclough 52 Ill. 106.

rule elsewhere is that, after the expiration of a reasonable time to remove the baggage the carrier's liability as insurer ceases, and it becomes liable only for negligence as a warehouseman. But, since a warehouseman would be guilty of negligence in storing the baggage in an insecure place, the results obtained under the Illinois rule probably do not vary much from the results obtained elsewhere.

§ 614. SAME—WHAT IS REASONABLE TIME FOR DELIVERY.

What constitutes a reasonable time and opportunity to call for baggage by a passenger is a mixed question of law and fact, depending very much on the facts of each individual case. All the circumstances surrounding the case should be considered, including the custom of the company, and the manner of transporting baggage from the station.[1] It has, however, been held that, when the facts are undisputed, what is a reasonable time is a question of law for the court.[2]

On this subject, the supreme court of Georgia [3] has recently said: "Whatever may be, in this respect, a reasonable time, it is quite certain that the passenger is not too late in demanding his baggage if he does so

§ 614. [1] Mote v. Railroad Co., 27 Iowa, 22; Brown v. Railway Co., 3 Man. 496.

[2] Mortland v. Railway Co., 81 Hun, 473, 30 N. Y. Supp. 1021; Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510. But in Gilhooly v. Navigation Co., 1 Daly (N. Y.) 197, it was held that what is a reasonable time is in all cases a question of fact, and the finding of the jury on that question will not be disturbed.

[3] Georgia R. & B. Co. v. Phillips, 93 Ga. 801, 20 S. E. 646.

immediately after reaching his destination. On the other hand, the railroad company is also entitled to a reasonable time within which to deliver the baggage. What will constitute a reasonable time in this respect must necessarily vary according to the circumstances. In some instances, a few minutes will be all the time to which the company is entitled. In other instances, the lapse of a much longer period before delivering the baggage would not be unreasonable. * * * We are satisfied, however, that, during the time within which a railroad company may reasonably detain a passenger's baggage, the relation of carrier and passenger still exists between the parties, and the liability of the railroad company does not become that of a mere warehouseman. Of this there can scarcely be a doubt, if the passenger himself has exercised due diligence in point of time in calling for his baggage." There is no doubt of the soundness of these propositions, but in some of the cases a more rigid rule is apparently laid down. It has been said that the reasonable time within which a passenger must apply for his baggage, when it is transported by the same train on which he himself travels, is directly after its arrival and transfer to the platform, making due allowance for the confusion occasioned by the arrival and departure of the train, and for the delay necessarily caused by the crowd on the platform.[4] But, as the cases considered

[4] Chicago & A. R. Co. v. Addizoat, 17 Ill. App. 632; Ouimit v. Henshaw, 35 Vt. 604; Galveston, H. & S. A. Ry. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

in the next section will show, it is believed that this is not quite correct as a general proposition.

§ 615. SAME—DELAY FOR CONVENIENCE OF CARRIER.

To relieve itself from its liability as a common carrier, it is the duty of a railroad company to have a baggage master at hand to deliver baggage for a reasonable time after the arrival of the train, and at reasonable hours thereafter.[1] If a passenger demands his baggage of the company immediately after reaching destination, and the company refuses to deliver before morning, the company is liable for the destruction of the baggage during the night by an accidental fire.[2] So, where a passenger demands his baggage within a reasonable time after he arrives at his destination, and the company, having the trunk at its depot at destination, fails or refuses to deliver it, the company is responsible to the owner for its contents, although the trunk was subsequently broken open and robbed with-

§ 615. [1] Dininny v. Railroad Co., 49 N. Y. 546. Immediately after the arrival of a train, the baggage master placed a passenger's trunk in the depot, and went away. The passenger waited 15 minutes to get the trunk, but could find nobody to deliver it. Three hours later she sent her son to get it, but the baggage master was still absent. The son then looked up the baggage master, and got the trunk from the baggage room; but, finding that the driver and wagon employed to get the trunk had gone, and that no other could be obtained, the trunk was left in charge of the baggage master for the night. Held, that the railroad company continued liable during the night as a common carrier of the trunk, and was liable for the loss of its contents by burglary during the night. Id.

[2] Georgia R. & B. Co. v. Phillips, 93 Ga. 801, 20 S. E. 646.

out its fault.[3] Nor is a railroad company relieved from its liability as a common carrier by the delivery of the baggage to a warehouseman, if no reasonable opportunity was in fact afforded the owner to get it after its arrival at destination.[4]

§ 616. SAME—DELAY FOR CONVENIENCE OF PASSENGER.

Where a passenger fails to call for his trunk on arriving at destination in the evening, and leaves it in the hands of the company overnight, without any arrangement with it, the company is not liable as insurer for the safety of the baggage during the night.[1] In

[3] Kansas City, Ft. S. & G. R. Co. v. Morrison, 34 Kan. 502, 9 Pac. 225. "The liability of the railroad company was co-extensive with its custody of the trunk, and continued until it was safely delivered into the hands of its owner, if the owner demanded and called for the trunk within a reasonable time after it reached destination."

[4] Pennsylvania Co. v. Liveright, 14 Ind. App. 518, 41 N. E. 350.

§ 616. [1] Roth v. Railroad Co., 35 N. Y. 548; Wald v. Railroad Co., 92 Ky. 645, 18 S. W. 850; Louisville, C. & L. R. Co. v. Mahan, 8 Bush (Ky.) 184; Ross v. Railroad Co., 4 Mo. App. 583. Some of the decisions of the supreme court of New York are opposed to this view, but it would seem that the decision of the court of appeals ought to settle the law for that state. Thus, it has been held that, where baggage arrives at destination between 6 and 7 o'clock in the evening, a delay in calling for it until 7 o'clock the next morning is not unreasonable, especially where the company's employés consent to retain the baggage. Burgevin v. Railroad Co., 69 Hun, 479, 23 N. Y. Supp. 415. Where a passenger arrives at destination on a Saturday afternoon, and, being unable to carry away his baggage, leaves it until the next Monday morning, the carrier continues liable as such during this time, and is responsible for its loss by theft during the interval. Curtis v. Railroad Co., 49 Barb. 148. Where the baggage arrives at destination late at night, the question whether the passenger's delay in call-

such a case, a finding by the jury that he called for it within a reasonable time will be disregarded as against the evidence.[2] So a railroad company is not liable for the loss of baggage by theft, without its fault, which arrived and was placed in its baggage room at 3 p. m., but which was not called for by the passenger until 9:30 p. m.[3] So, where a passenger on a steamboat neglects to claim her trunk for 17 hours after the arrival of the boat at destination, during which time the trunk is destroyed by fire without any negligence on the part of the carrier, the carrier is not liable. The fact that the boat arrives on a Sunday, and that Sunday labor is prohibited by statute, does not vary or affect the question of the carrier's liability.[4] So, where the manager of a theatrical company, having in his possession the

ing for it until the next morning is unreasonable is for the jury. Cary v. Railroad Co., 29 Barb. 35.

[2] Vineberg v. Railroad Co., 13 Ont. App. 93.

[3] Penton v. Railway Co., 28 U. C. Q. B. 367. A passenger arrived at her destination at 4:25 p. m., and, finding no one at the station to meet her, informed the porter in the company's employ that she would leave her luggage at the station for a short time, and then send for it. The porter replied that he would take care of it. At 6 o'clock the same day, the passenger claimed her luggage, when one of the boxes was missing. Held, that the company's responsibility as a common carrier was at an end when the baggage was taken from the baggage room and placed at her disposal before leaving the station, that the porter in volunteering to take care of it was not acting as the company's servant, and that the company was not liable. Hodkinson v. Railway Co., 14 Q. B. Div. 228.

[4] Jones v. Transportation Co., 50 Barb. 193. Where a passenger fails to remove his trunk from a vessel for more than a day after its arrival, the liability of the vessel owner as common carrier ceases, and he is liable only as warehouseman. Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 454. Where a passenger leaves his baggage at a depot

checks for the company's baggage, as well as of the individual members, takes only the company's baggage at destination, and leaves the balance on the baggage car, on the baggage master's assurance that it will be safe, the company's liability as common carrier terminates.[5] The fact that a passenger arrives at his destination at 11 p. m., and that there are no vehicles at the depot, does not excuse his delay in removing the baggage until the next morning, where there are vehicles in the city, a mile from the depot.[6]

§ 617. SAME—DELIVERY ACCORDING TO CUSTOM.

The question as to what is a reasonable time within which a passenger should demand his baggage depends at times on the custom established by the carrier. Thus, where the custom of a depot company in a large city is to postpone delivery of baggage for two hours after the arrival of a train, the liability as insurer exists for baggage stolen during that time, though the passenger failed to call for it until the next day.[1] So, where baggage arrives at 7:40 p. m., and it is usual for the station agent to lock up for the night at 8 p. m., and the custom is to leave baggage arriving on the 7:40 train until the following morning, the question whether a demand for the baggage the following morn-

for more than 24 hours after his arrival, the company is not liable for its loss by theft. Holdridge v. Railroad Co., 56 Barb. 191.

[5] Mortland v. Railway Co., 81 Hun, 473, 30 N. Y. Supp. 1021.

[6] Kansas City, Ft. S. & M. Ry. Co. v. McGahey (Ark.) 38 S. W. 659.

§ 617. [1] Jacobs v. Tutt, 33 Fed. 412.

ing was made within a reasonable time is for the jury; and, if they find it was, the company is liable for the accidental destruction of the baggage during the night by fire.[2] Where a steamboat arrives at destination at about 10 o'clock at night, and it appears that passengers and their baggage frequently remain on board during the night, the steamboat owners continue liable as common carriers of baggage during the night, and until the passenger has had a reasonable opportunity to remove it next morning.[3]

Where it is the custom of common carriers to allow the baggage of passengers to be taken in charge by servants in their employ, to be delivered by them in a certain place and in a certain manner, they will be liable for loss of baggage arising from the neglect of their employés to deliver according to custom.[4] Thus, where it is customary for porters in the employ of a railroad company to assist passengers to obtain cabs within the station, and to place their luggage therein, the com-

2 George F. Ditman Boot & Shoe Co. v. Keokuk & W. Ry. Co., 91 Iowa, 416, 59 N. W. 257.

3 Powell v. Myers, 26 Wend. (N. Y.) 591. Where a steamer on an inland river arrives at her port, a large city, at 9 o'clock at night, the captain has the implied authority to invite or permit passengers to remain on board until morning; and the voyage is not ended until passengers who remain on board under such permission have had a reasonable time the next morning to leave the boat and to remove their baggage. Hence the steamboat owners are liable as common carriers for the destruction of such a passenger's baggage during the night by the burning of the boat. Prickett v. Anchor Line, 13 Mo. App. 436.

4 Fisher v. Geddes, 15 La. Ann. 14.

pany's liability as carrier continues until the luggage is placed in the cab.[5]

§ 618. SAME—MISTAKE.

A passenger should not prolong the strict and rigid liability of a railroad company as a common carrier longer than is reasonably necessary under the circumstances and exigencies of the particular case, or for any purpose of his own convenience. If a passenger is notified that his baggage has not arrived on the train he came on, and he gives no directions concerning it, and no information to identify himself, so notice of its arrival can be given, it is his duty to make inquiry for it the first convenient opportunity after the arrival of the next train, and within a reasonable time.[1] Nor is the failure of a passenger to call for his luggage within a reasonable time after the arrival of his train excused by his belief that it is not on that train, if it was in fact there.[2] So, where a passenger, on alighting from a train, takes, by mistake, a portmanteau belonging to some one else, which he sees on the platform, and drives with it a mile to his house, when he discovers his mistake, and returns to get his own, the company is not liable as common carrier for its loss during the interval, since he has had a reasonable time to get it.[3]

5 Butcher v. Railway Co. (1855) 16 C. B. 13.

§ 618. 1 Chicago & A. R. Co. v. Addizoat, 17 Ill. App. 632.

2 Brown v. Railway Co., 3 Man. 496.

3 Firth v. Railroad Co., 36 Wkly. Rep. 467.

But where a passenger's baggage is carried to a point not his destination by the carrier's mistake, the carrier's liability as such is not terminated by storing the baggage in its baggage room at that place.[4]

§ 619. SAME—PASSENGER STOPPING AT INTERMEDIATE STATION.

Unless the carrier is itself at fault, the passenger cannot, for purposes of his own convenience, or by reason of any inevitable accident to himself, be permitted to extend the strict and rigid liability incident to common carriers in respect to baggage after it has reached his destination. Hence, the fact that a passenger on a railway is taken sick, and is given a lay-over ticket, so that he does not reach his destination as soon as his baggage, will not have the effect of extending the liability of the carrier as insurer beyond what it would otherwise be, and prevent the liability of warehouseman from attaching.[1] Nor does the granting of a stop-over privilege cast any obligation on the carrier to unload the passenger's baggage at the stop-over station; and it is not liable for the destruction of the baggage at destination without any fault on its part.[2]

But where through passengers are permitted to stop overnight at an intermediate point, the fact that one of them takes her baggage to the hotel does not break the continuity of the bailment, so as to relieve the car-

[4] Toledo, W. & W. R. Co. v. Hammond, 33 Ind. 379.

§ 619. [1] Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510.

[2] Howell v. Railway Co., 92 Hun, 423, 36 N. Y. Supp. 544.

rier from liability for its loss while being transported the next day.[3] So, where a passenger on a steamboat, holding a ticket entitling him to transportation to the city of New York, leaves the vessel at the quarantine station in the port of New York, the steamboat owner, in the absence of an offer to deliver his baggage at quarantine, continues liable therefor until the end of the journey at the city of New York, and for a reasonable time thereafter.[4]

§ 620. SAME—DEATH OF PASSENGER DURING VOYAGE.

Where a passenger dies on shipboard, the delivery of his effects to his administrator, appointed by the court of another state, discharges the master of the vessel.[1] A contract for the conveyance of passengers has been held to be governed by the law of the place where it is made, and not by that of the shipowner's domicile. And where, by the laws of that place, the captain must make an inventory of the effects of a passenger who dies on board, and deliver them at the place of destination, the owner of the vessel is absolutely bound for the delivery of the passenger's effects, of which the captain took possession, though they consist in part of a large sum of money, of which no notice was given by the passenger when he got on board.[2]

3 Wilson v. Railroad Co., 21 Grat. (Va.) 654, 665.
4 Gilhooly v. Navigation Co., 1 Daly (N. Y.) 197.

§ 620. 1 Walker v. Goslee, 11 La. Ann. 389.
2 Malpica v. McKown, 1 La. 248.

§ 621. LIABILITY AS WAREHOUSEMAN.

After a passenger has had a reasonable time to remove his baggage at destination, the carrier is bound to use ordinary care for its safety and preservation.

If a passenger does not call for his baggage on arrival, the company cannot leave it uncared for, or abandon it. Its strict responsibility as a carrier will cease after a reasonable time has elapsed to enable the owner to claim it; and a modified liability, like that of a warehouseman, will supervene.[1] This obligation is not a new and independent obligation, arising from the unprovided-for and accidental circumstance of the property being left in the hands of the carrier, but is imposed by the contract of carriage.[2]

The obligation of the carrier as warehouseman is to take common and reasonable care of the property intrusted to its charge, and exercise towards it such diligence as men usually exert in respect to their own concerns.[3] What is such care and diligence is usually a

§ 621. [1] Matteson v. Railroad Co., 76 N. Y. 381; Louisville, C. & L. R. Co. v. Mahan, 8 Bush (Ky.) 184.

[2] Burnell v. Railroad Co., 45 N. Y. 184. The fact that the company agrees to store a passenger's baggage for 24 hours after its arrival does not make it a gratuitous bailee during this period, but such storage is to be considered as paid for by the payment of the passenger's fare. Nealand v. Railroad, 161 Mass. 67, 36 N. E. 592.

[3] Mote v. Railroad Co., 27 Iowa, 22; Warner v. Railroad, 22 Iowa, 166; Rome R. R. v. Wimberly, 75 Ga. 316; Georgia Railroad & Banking Co. v. Thompson, 86 Ga. 327, 12 S. E. 640; Harlow v. Railroad Co., 8 Gray (Mass.) 237. If a passenger fails to call for his baggage

question for the jury. But the fact that the depot at which the passenger's baggage was stored was constructed of pine timber is not evidence of negligence which will make the company, as warehouseman, liable for the destruction of the baggage by fire; the depot being in a small town, and not exposed to any unusual dangers from fire.[4] Nor is a railroad company liable for the theft of a trunk during the night after its arrival, where it was stored in the baggage room at the depot, and the doors and windows were locked, and the burglars effected an entrance by breaking a window pane.[5] But it is a question for the jury wheth-

within a reasonable time after its arrival at destination, the company should deposit the baggage in its baggage room, in which event its responsibility becomes that of warehouseman, and it must respond in damages for any neglect in that capacity. The baggage room need not be absolutely burglar proof, but it must be such a place as a man of ordinary prudence would use for the storage of his own goods. Kansas City, Ft. S. & M. R. Co. v. Patten, 3 Kan. App. 338, 45 Pac. 108. A steamboat company which places a passenger's baggage in a warehouse at the termination of the voyage is not liable for the destruction of the baggage by a fire occurring without its fault or that of the warehouseman. Laffrey v. Grummond, 74 Mich. 186, 41 N. W. 894. A passenger's baggage was landed on a pier from a steamer, and the steamship company agreed to store it for the passenger's convenience for a week or so. On the day after it was landed, and while still on the pier, it was destroyed by fire not caused by the company's negligence. Held, that the company's liability was merely that of a warehouseman, and that it was not liable for the destruction of the baggage. National Line S. S. Co. v. Smart, 107 Pa. St. 492.

[4] Wald v. Railroad Co., 92 Ky. 645, 18 S. W. 850. Nor is the failure of the agents in charge of the depot to take steps to prevent a traction engine near the depot from being moved by steam at night evidence of negligence, if there was no reasonable ground to apprehend danger from escaping sparks. Id.

[5] Cohen v. Railway Co., 59 Mo. App. 66.

er or not it is negligence for the company to permit oily cotton waste to accumulate in a closet in its baggage room, by reason of which a fire breaks out and destroys the baggage.[6] So, where a station agent receives a trunk in the afternoon with knowledge that the owner intends to take a train the following day, the fact that the agent left it on the station platform while at supper, instead of placing it in the baggage room provided for that purpose, will warrant the jury in finding negligence which will render the company liable for the theft of the trunk while on the platform.[7] But where a passenger, on alighting from a railroad train, gives her hand baggage to the baggage master at the depot, to be kept gratuitously until called for, the company is not liable for the baggage as common carrier, but only for gross negligence as a gratuitous bailee.[8]

§ 622. SAME—TERMINATION OF LIABILITY.

In many of the states statutes exist authorizing railroad companies to sell unclaimed baggage after holding it for a certain length of time, generally 12 months. A sale pursuant to such a statute, of course, terminates the company's liability as a warehouseman; and the refusal of the company's storekeeper to thereafter deliver the baggage to the passenger on demand does not establish a conversion.[1] It has also been held that the

6 Nealand v. Railroad, 161 Mass. 67, 36 N. E. 592.

7 Thompson v. Railway Co., 59 Mo. App. 37.

8 Minor v. Railway Co., 19 Wis. 40.

§ 622. 1 McClellan v. Wyatt, 26 Abb. N. C. 144, 11 N. Y. Supp. 686.

surrender of his baggage checks by a passenger to the baggageman relieves the company from liability both as carrier and as warehouseman, and thereafter it cannot be held for the misdelivery of the baggage to a stranger.[2]

§ 623. CONNECTING CARRIERS — LIABILITY OF EACH AS TO ITS OWN LINE.

Where a ticket is purchased, good over several connecting lines, and the passenger's baggage is checked through to destination, and the ticket is recognized as valid when presented to the different lines, each one of the connecting carriers is an insurer of the baggage while on its own line.

No conflict of authority as to this proposition has ever existed in this country.[1] In England, however, it was at one time held that a passenger could not recover from a connecting carrier for luggage lost on its own road, because his contract was with the first carrier, and no privity of contract existed between him and the connecting carrier.[2] But this case has been expressly overruled, and it is now held in England that where a railroad company sells a ticket to a point beyond its own line, and takes charge of a passenger's luggage,

[2] Mattison v. Railroad Co., 57 N. Y. 552.

§ 623. [1] Chicago & R. I. R. Co. v. Fahey, 52 Ill. 81; Glasco v. Railroad Co., 36 Barb. (N. Y.) 557; McCormick v. Railroad Co., 4 E. D. Smith (N. Y.) 181.

[2] Mytton v. Railway Co. (1859) 4 Hurl. & N. 615, 28 Law J. Exch. 385.

and such luggage is delivered to the connecting line at the terminus of the first line, the connecting line is responsible for loss of or injury to the luggage while in its possession. By accepting the luggage for transportation, the connecting line assumes the same obligation for its safe delivery as though it had directly contracted with the passenger.[3] Under this rule, a connecting carrier is liable for losses on its own road, even though the first carrier, under its contract with the passenger, may also be jointly liable.[4]

On the same principle, a railroad company is liable for the loss of a passenger's baggage while carried on its train, though the train is then on the track of another company, and drawn by the engine of that company, and though the trunk was delivered to the baggage master of that company.[5]

This liability of a carrier of baggage to be transported over its own and a connecting line continues, at least, until delivery to the connecting carrier; and the fact that the baggage, on its arrival at the connecting station, at a depot which was used by both carriers, was taken in charge of by their common agent, and placed in the baggage room, where it was destroyed, is not sufficient to relieve the original carrier from liability.[6] So, where a passenger train arrives late at night, and it is the usual course of the company, on being informed that baggage on that train is going on in

[3] Hooper v. Railway Co. (1880) 50 Law J. C. P. 103.

[4] Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93.

[5] Jordan v. Railroad Co., 5 Cush. (Mass.) 69.

[6] Hyman v. Railroad Co., 66 Hun, 202, 21 N. Y. Supp. 119.

the morning by another train over a connecting road, to put it in its baggage room, and keep it for delivery in the morning to the servants of the other road, when called for by the owner, and requested to do so, its custody of the baggage during the night is that of carrier, and not of warehouseman.[7]

But where, by mistake, the baggage of a traveler is delivered by a railroad company to a connecting line different than the one on which the passenger has taken passage, and is accepted by such line, and transported to the traveler's destination, such connecting line is liable as a warehouseman while the baggage remains in its possession, and is bound to exercise ordinary care for its safety.[8]

§ 624. SAME—LIABILITY OF FIRST CARRIER BEYOND ITS LINE.

By the great weight of authority, both in England and in America, the sale of a through ticket, though in form a coupon ticket, and the checking of a passenger's baggage through to destination, import a contract by the first carrier to transport the baggage through to destination, and hence it is liable as an insurer of the baggage on the connecting lines. In some jurisdictions, however, its liability terminates on the delivery of the baggage to a connecting carrier.

[7] Ouimit v. Henshaw, 35 Vt. 604, 617.

[8] Fairfax v. Railroad Co., 73 N. Y. 167, affirming 43 N. Y. Super. Ct. 18; Id., 67 N. Y. 11, reversing 40 N. Y. Super. Ct. 128, 37 N. Y. Super. Ct. 516.

We have seen that, by the weight of authority, the liability of a common carrier for the safety of the person of the passenger terminates at the end of its line, and is not extended to that of another company by the sale of a ticket to a point on that line, in the absence of a special contract or a partnership arrangement between the two roads.[1] This rule has also been applied to the passenger's baggage by some of the American courts. A railroad company receiving a passenger and his baggage for transportation over its own and connecting roads is not liable for losses beyond its own line, in the absence of a special agreement that it will be so liable.[2]

But the great weight even of American authority is

§ 624. [1] Ante, § 372.

[2] Mauritz v. Railroad Co., 23 Fed. 765; Milnor v. Railroad Co., 53 N. Y. 364, affirming 4 Daly (N. Y.) 355; Green v. Railroad Co., Id. 553, 12 Abb. Prac. N. S. (N. Y.) 473. In an action for the loss of baggage beyond the terminus of the initial carrier's route, it is incumbent on plaintiff to prove a contract by such carrier to transport beyond that terminus. A check merely indicating the destination of the baggage, and the different railroads over which it is to pass, is not proof of such a contract. Marmorstein v. Railroad Co., 13 Misc. Rep. 32, 34 N. Y. Supp. 97. In some of the earlier New York cases, however, a different principle is announced. When a railroad company sells a ticket to a point beyond its line, and checks the passenger's baggage through to destination, it is liable for the loss of the baggage on the connecting line. Burnell v. Railroad Co., 45 N. Y. 184; Cary v. Railroad Co., 29 Barb. (N. Y.) 35. A passenger holding a ticket good over several connecting lines retained the custody of his valise until after he had arrived at the terminus of the first carrier's road. He then delivered it to the baggage master, and had it checked. Held, that the first carrier was not liable for its loss, in the absence of evidence that the various lines were co-partners. Straiton v. Railroad Co., 2 E. D. Smith (N. Y.) 184.

the other way. A reason has been pointed out why a different rule should prevail as to the person of the passenger and as to his baggage. "There can never be any doubt as to the carrier by whose fault the passenger is injured or the personal contract with him violated, while, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight." [3] It has accordingly been held in several American cases that the sale of a through ticket, for a single fare, by a railroad company to a point on a connecting line, together with the checking of the baggage through to destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, which, in the absence of all other circumstances, will make such carrier liable for faithful performance and for all loss on connecting lines the same as its own.[4] This is also the rule in Canada and in Eng-

[3] Louisville & N. R. Co. v. Weaver, 9 Lea (Tenn.) 38.

[4] Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647; Hawley v. Screven, 62 Ga. 347; Louisville & N. R. Co. v. Weaver, 9 Lea (Tenn.) 38. In the two cases last cited it was said that checking the baggage through to destination is a contract to carry it to destination. But it would seem that checking baggage is merely evidence of its receipt by the carrier, and is not the contract to carry. See post, § 625. And checking baggage through to destination would seem to be merely a device to rid the passenger of the necessity of looking after his baggage at the end of each of the connecting roads, and of having it rechecked. On this subject the New York court of appeals has said: "Personal delivery of baggage to the passenger at the end of the transit on a particular road has to a great extent been superseded, in case of through passengers having tickets for an entire route owned and operated by separated but con-

land.[5] So, where a railroad company enters into a contract with a stagecoach company to convey passengers and baggage from the terminus of the road to a place about 20 miles away, and sells passengers through tickets to that place, the railroad company is liable for the loss of a passenger's baggage by the stagecoach company, in the absence of any limitation of liability on its part.[6]

Of course, the first carrier may expressly undertake to carry a passenger's baggage through to destination; and in that case there can be no question as to its liability while the baggage is on the line of a connecting carrier. Thus, a steamship company operating a line of steamers between Liverpool and the United States,

necting lines, by the custom of the first carrier checking the baggage to the final destination, and delivering it at the end of his route to the next succeeding carrier, who in his turn delivers to the next carrier, and so on toties quoties, until it reaches the possession of the last carrier on the route. This general practice is a matter of common experience and observation, and has so become a part of the common knowledge of the community that courts may take judicial notice of its existence. It has generally been adopted by reason of its manifest utility and convenience, and the practice promotes the mutual interests of the railroads and the public. It may not be, and probably is not, a practice obligatory upon the railroad companies, and mutual arrangements between connecting roads must be made before the practice can be adopted; but the fact remains that in most cases such arrangements are perfected, and a traveler having a through ticket over connecting lines may reasonably expect, on delivering his baggage to the first carrier, to receive a check relieving him from the necessity of seeing to its transfer to the several successive lines of travel." Isaacson v. Railroad Co., 94 N. Y. 278.

[5] Smith v. Railway Co., 35 U. C. Q. B. 547, following Muschamp v. Railway Co., 8 Mees. & W. 421.

[6] Wilson v. Railroad Co., 21 Grat. (Va.) 654.

which sells a through ticket to a passenger in Germany, good over the lines of connecting companies and on the steamer, is liable for the loss of the passenger's baggage on one of the connecting lines, where the steamship company's agent represented to the passenger that it undertook the safe carriage of the baggage over the whole route.[7] So, if baggage is checked by the first carrier over a different connecting route than that indicated by the passenger's ticket, the first carrier is liable for the loss of the baggage while on the connecting line, where the passenger has been guilty of no contributory negligence in failing to discover the mistake.[8]

§ 625. SAME—LIABILITY OF CONNECTING CARRIER BEYOND ITS LINE.

A connecting carrier is not liable for a passenger's baggage beyond its own line, in the absence of any showing that the carriers concerned in the transportation are partners, either inter se or as to third persons.

Where baggage is delivered to a carrier to be transported over its own and a connecting road, the connecting road is not liable for its loss, unless the baggage came into its possession, or unless the roads were partners either inter se or as to third persons.[1] In such

7 Maskos v. Steamship Co., 11 Fed. 698.

8 Isaacson v. Railroad Co., 94 N. Y. 278, reversing 25 Hun (N. Y.) 350.

§ 625. 1 Michigan S. & N. I. R. Co. v. Meyres, 21 Ill. 627; Candee v. Railroad Co., 21 Wis. 582; Croft v. Railroad Co., 1 MacArthur (D. C.) 492; Furstenheim v. Railroad Co., 9 Heisk. (Tenn.) 238; Kessler

a case, the first company either made a through contract for the entire route, or it acted as agent for the other in selling the ticket and in checking the baggage; and in either view the connecting carrier would not be liable without proof that the baggage came into its possession, or that a partnership arrangement existed between the roads.[2] The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations of the companies, or the basis upon which through business was done by them, fail to show such a community of interest as would make them partners inter se or as to third persons.[3]

But, in Georgia, it has been held, in opposition to these cases, that where a through ticket is issued, good over several connecting roads, and the passenger's baggage is checked through to destination, the last carrier is liable to the passenger for its loss, though it shows that the trunk never came into its possession. After it has paid the passenger for the baggage, it may reimburse itself from the road on whose line the baggage was lost.[4]

v. Railroad Co., 61 N. Y. 538, affirming 7 Lans. (N. Y.) 62; Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93.

[2] Kessler v. Railroad Co., 61 N. Y. 538.

[3] Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93.

[4] Savannah, F. & W. Ry. v. McIntosh, 73 Ga. 532.

§ 626. SAME—PARTNERSHIP AND JOINT TRAFFIC ARRANGEMENTS.

As we have already seen, the mere sale of a through ticket to a point beyond the line of the selling company, and the checking of the passenger's baggage through to destination, do not render the various roads over which the passenger must travel to reach his destination joint contractors, so as to make any one of the connecting carriers liable for the loss of a passenger's baggage, where it appears that the baggage never came into its hands.[1]

But where three separate railroad companies, owning distinct portions of a continuous railroad between two termini, run their cars over the whole road, employ the same agents to receive baggage and sell tickets, and receive baggage to be carried over the entire road, the

§ 626. [1] See ante, §§ 372, 625. See, also, Felder v. Railroad Co., 21 S. C. 35. But the supreme court of Iowa seems to have reached a different conclusion. A railroad company, selling a coupon ticket good over its own and three connecting lines, checked the passenger's baggage only to the terminus of its own line. At that point the baggage was rechecked to the passenger's destination, and an extra compensation for overweight was charged for the three connecting lines. Each of the coupons bore the initials of the company over whose lines it was good, and the passenger was carried through on the three connecting lines without further rechecking of his baggage. Held, that there was some evidence authorizing the jury to find that the three connecting roads were jointly interested in the transportation of the baggage, and jointly bound for its safe delivery, and that the passenger could recover damages against all three where his baggage was delivered to him in an injured condition at destination, without proof as to where the injury occurred. Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573.

last line is liable for the loss of baggage received by its agent on the first road, to be carried over the whole route, though it is not shown that the baggage ever actually came on the portion of the line owned by it.[2] So, where several railroad companies arrange to send an excursion train over their roads, and the initial company issues tickets good for the whole distance, and its agent refuses to give a check for the baggage of a purchaser of such ticket, saying that it will be perfectly safe without it, and the baggage is accordingly put on board of the baggage car, which is sent through the whole distance in charge of its agent, it is liable if the baggage is lost anywhere on the route beyond its own line.[3] So, where a railroad company delivers all of its baggage to a union depot company, to be cared for and delivered to passengers on presentation of checks, it makes the depot company its agent for such purpose, and it is liable for the loss of the baggage while in the depot company's custody, occurring before a reasonable time for delivery has elapsed.[4]

A tug or barge, licensed by the commissioner of immigration in the port of New York, pursuant to statute, to transport immigrants and their baggage from the

[2] Hart v. Railroad Co., 8 N. Y. 37. The owners of a line of canal boats, engaged in the business of common carriers of passengers and goods, who charter a boat to another transportation company for a single trip, retaining the charge of it, and navigating it with their own master and crew, are liable to a passenger for the loss of his goods on the passage. Campbell v. Perkins, Id. 430.

[3] Najac v. Railroad Co., 7 Allen (Mass.) 329.

[4] Jacobs v. Tutt, 33 Fed. 412; Ahlbeck v. Railway Co., 39 Minn. 424, 40 N. W. 364.

vessel to Castle Garden, but employed by and at the expense of the proprietors of the vessel, is but one of the agencies by which such proprietors carry out the contract for the transportation of the passenger to New York, and they are liable for the loss of the passenger's baggage while carried on the tug.[5]

§ 627. LIMITATION OF LIABILITY BY CONTRACT.

A common carrier of a passenger's baggage may by express contract relieve himself from his common-law liability as insurer; but, by the weight of authority, he cannot exempt himself from liability for the negligence of himself or his servants.

[5] Torpey v. Williams, 3 Daly (N. Y.) 162. The commissioners of immigration are not responsible for the loss of baggage delivered by an immigrant on board of a ship in the harbor of New York to the crew of a tug, to be transported to Castle Garden, although the tug or barge was licensed by them. Murphy v. Commissioners, 28 N. Y. 134. They do not act for themselves, it is said in that case, or employ agents, servants, or clerks for their own benefit, but for the benefit of the community at large. But, in the absence of any contract on the part of a common carrier to carry a passenger and his baggage to a particular city or place in the port of destination, it must be assumed that the carrier undertook to transport the passenger and his baggage to the place in the port of destination fixed by the established usage and custom of the carrier; and where the custom of a carrier of immigrant passengers for the port of New York is to terminate the voyage at Hoboken, opposite New York City, and to land all its passengers and baggage at Hoboken, such carrier is not liable for the loss of a passenger's baggage while being transported from Hoboken to Castle Garden, New York City, on a tug licensed by the commissioner of immigration. Klein v. Packet Co., 3 Daly (N. Y.) 390.

The power of a common carrier, by express contract, to exempt itself from liability as insurer is nowhere denied at the present time.[1] The question as to the carrier's power to contract for exemption from liability for its negligence and that of its servants has already been considered, so far as the person of the passenger is concerned.[2] It is believed that, wherever this power is denied to the carrier as to the passenger's person,—and it is denied in nearly all the United States,—the power is also by necessary implication denied so far as the passenger's baggage is concerned. In a few of the cases the power has been expressly denied.[3] In England,

§ 627. [1] A common carrier may, by express notice brought home to the passenger, exempt himself from the strict liability as insurer. Brooke v. Pickwick (1827) 4 Bing. 218. A common carrier may by contract exempt itself from liability for the loss of a passenger's baggage not caused by its negligence. Laing v. Colder, 8 Pa. St. 479.

[2] See ante, c. 28.

[3] A common carrier cannot, by contract, relieve itself from the consequences of its negligence, or that of its servants; and this rule applies to the case of a passenger and her baggage transported under a free pass. Mobile & O. R. Co. v. Hopkins, 41 Ala. 486. See, also, Jones v. Voorhees, 10 Ohio, 145. In New York, it was at one time held that, where notice is given that all baggage is at the risk of the owner, such notice excuses the carrier from losses happening by theft or robbery, in addition to the exemptions from responsibility as common carrier, but not from losses arising from actual negligence, or from insufficiency of its machinery or vehicles. Camden & A. R. & T. Co. v. Burke, 13 Wend. (N. Y.) 611. But in New York the carrier may now contract against its servant's negligence. See ante, § 391. The fact that a ship is burned at sea does not establish gross negligence on the part of the carrier, as matter of law, so as to make the carrier liable for the destruction of a passenger's baggage, which it was carrying under a contract limiting its liability to gross negligence; but the question is one of fact for the jury. Downey v. Steam-

however, as we have seen,[4] the rule at common law was otherwise. "It seems now incontestable that at common law it is open to carriers to limit their common-law liability by special agreement with the consignor of goods; and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence."[5] It has even been held that a special contract entered into between a shipowner and a passenger by sea, containing a provision that the shipowner should not be liable for the loss of baggage "under any circumstances," relieves the shipowner from liability for loss of baggage caused by the willful default and misfeasance of his servants.[6] But in 1854 a statute

ship Co. (City Ct. N. Y.) 2 N. Y. Supp. 659. The fact that a passenger's baggage was delivered into the custody of the steamship company's servants, who assumed charge of it, and that thereafter the passenger had no further control of it, and that at the end of the voyage the steamship company did not produce it, or account for its nonproduction, is sufficient to go to the jury on the question whether it was lost by gross negligence, within the meaning of a clause in the passenger's ticket exempting the carrier from liability for loss of baggage except in cases of gross negligence. Steers v. Steamship Co., 57 N. Y. 1.

[4] See ante, § 391.

[5] Peninsular & O. S. N. Co. v. Shand (1865) 3 Moore, P. C. (N. S.) 272, 293. Hence, where a carrier by sea by special contract stipulates to relieve himself from liability for "loss" of a passenger's luggage, the loss of the luggage during transportation does not cast on the carrier the burden of showing that it occurred without his fault. Id.

[6] Taubman v. Navigation Co. (1872) 26 Law T. Exch. (N. S.) 704. A steamship ticket signed by the passenger contained a condition that "the company will not be responsible for any loss or damage to luggage in any circumstances," and that the company should be at lib-

was enacted, known as the "Railway and Canal Traffic Act," section 7 of which renders railway and canal companies liable for loss of or injury to "any articles, goods, or things, in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability." It has been held that passenger's luggage is "articles, goods, or things," within the meaning of this

erty to land any passenger suffering from infectious disease. Some days after sailing, the passenger fell ill of typhoid fever, and was landed at an intermediate port in an insensible condition. His luggage was also landed, but he never saw it again. Held, that the company was not liable for the loss. Thompson v. Packet Co., 5 Asp. 190, note. But a by-law of a railroad company exempting it from liability for loss of luggage "unless booked and paid," is not binding on a passenger, unless the company has provided means for the booking of the luggage. Great Western Ry. Co. v. Goodman (1852) 12 C. B. 313. So a by-law of a railroad company permitting a first-class passenger to carry 112 pounds of luggage free of charge, but exempting the company from all liability therefor unless its carriage is paid for, is in contravention of a statute under which it is incorporated, giving the passenger the right to carry 40 pounds of luggage free of charge, and rendering the company liable therefor as a common carrier. Williams v. Railway Co. (1851) 10 Exch. 15. So the supreme court of Canada has held that where a traveling men's association enters into a contract with a railroad company under which the traveling men get transportation at a reduced rate, with an allowance of 300 pounds of baggage free, "but the baggage must be at owner's risk against all casualties," the employers of a commercial traveler, who was transported under this agreement, cannot recover for samples of merchandise carried in his trunk which were damaged by the negligence of the carrier's servants. Dixon v. Navigation Co., 18 Can. Sup. Ct. 704, affirming 15 Ont. App. 647.

statute,[7] and that St. 31 & 32 Vict. c. 119, § 16, which extends the provisions of the railway and canal traffic act, so far as applicable, to steam vessels and the traffic carried on thereby, includes this provision against the limitation of liability in cases of negligence.[8] But a passenger's luggage deposited by him in the cloak room of a railroad company at the close of his journey is not received by the company in its capacity as common carrier, but as warehouseman, and hence the statute prohibiting the limitation of liability has no application.[9]

§ 628. SAME—CONNECTING LINES.

A railroad company, selling a ticket good over several connecting lines, may by contract exempt itself from liability for loss of or injury to baggage beyond its own line, by whatever cause produced,[1] though it checks the baggage through to destination,[2] and though it exacts an extra compensation for the baggage in excess of 100 pounds.[3] But it has been held that a

[7] Cohen v. Railway Co. (1877) 2 Exch. Div. 253, affirming 1 Exch. Div. 217, overruling Stewart v. Railway Co., 3 Hurl. & C. 135.

[8] Cohen v. Railway Co., 2 Exch. Div. 253, 261, disapproving Doolan v. Railway Co., Ir. R. 10 C. L. 47.

[9] Van Toll v. Railway Co. (1862) 12 C. B. (N. S.) 75. See, also, post, p. 1516.

§ 628. [1] Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573; Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208; Nealon v. Railway, 5 N. Y. St. Rep. 256, 24 Wkly. Dig. 523; Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co., 31 Fed. 247.

[2] Talcott v. Railroad Co., 89 Hun, 492, 35 N. Y. Supp. 574, reversing 66 Hun, 456, 21 N. Y. Supp. 318.

[3] Gulf, C. & S. F. Ry. Co. v. Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

condition in a ticket, good over several lines of railroad, that the selling company "acts as agent, and is not responsible beyond its own line," has reference only to injuries to the person, and does not apply to the passenger's baggage.[4]

In England it has been held that by common law there is nothing to prevent a railway carrier, which has sold a ticket to a point beyond its own line, from limiting its liability for loss of luggage to its own line; and the railway and canal traffic act, referred to in the preceding section, does not prohibit a limitation of liability to the carrier's own line.[5] But a railway company which issues a ticket to a point beyond its own line, containing such a stipulation, must show that it delivered the baggage to the connecting line; and the passenger is entitled to recover against it where it appears that the last seen of the baggage was at the connecting station on a truck, on which it had been loaded to be transferred to the connecting line.[6]

§ 629. SAME—MODE IN WHICH LIABILITY MAY BE LIMITED.

The earliest mode in which carriers sought to limit their common-law liability was by notice posted on their premises and in their offices; but such notices, when interposed as a defense to actions, were held by the courts ineffectual for any purpose, and it is prob-

4 Coward v. Railroad Co., 16 Lea (Tenn.) 225.
5 Zunz v. Railroad Co., L. R. 4 Q. B. 539.
6 Kent v. Railway Co. (1874) L. R. 10 Q. B. 1.

ably settled law that a common carrier of passengers cannot restrict his common-law liability by a notice posted in his office and in public places that baggage is at the risk of the owner.[1]

The next method devised to accomplish this purpose was by a condition printed on the passage ticket, and, it seems, at times, also, on the baggage check. We have already seen that the rule adopted by the courts as to tickets is that, before a passenger is bound by a condition on a ticket limiting the carrier's liability, it must appear that he knew of the condition, or that the carrier did what was reasonably sufficient to give notice of the condition.[2] This rule, it seems, ought to apply equally, whether the action is for injury to the person of the passenger, or for loss of or injury to his baggage, though in the latter class of cases some of the courts seem to go further, and to require absolute proof of knowledge of the condition by the passenger when he purchased and paid for the ticket. The liability of a railroad company, it is said by the New York court of appeals, for the safe carriage of a passenger's baggage, is not limited by a notice printed on the face of a ticket issued by it, stating the terms upon which the baggage

§ 629. [1] Hollister v. Nowlen, 19 Wend. 234; Cole v. Goodwin, Id. 251; Camden & A. R. & T. Co. v. Belknap, 21 Wend. 354. A notice, posted in the carrier's steamboat, that the owners will not be liable for baggage, unless it is checked, will not protect them against the claim of a passenger who delivered his baggage to their agent on board the boat, and demanded a check, but failed to obtain it because the person whose duty it was to give checks was not present. Freeman v. Newton, 3 E. D. Smith (N. Y.) 246.

[2] See ante, § 399.

will be carried. If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and the rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights.[3] In Ohio, the rule is that an attempt, by words on a ticket or a baggage check, to limit the carrier's liability for loss of baggage, will be wholly unavailing, unless the carrier shows that the passenger, with knowledge of such limitation, agreed that it might be made.[4] So the delivery of a ticket to a passenger, bearing on its face, in small type, the words "Look on the back," does not give rise to a presumption of law that the passenger had notice of a stipulation on the back of the ticket limiting the company's liability for

[3] Rawson v. Railroad Co., 48 N. Y. 212. An assent by a passenger to a limitation of the carrier's liability will not be implied where such limitation is communicated to the passenger for the first time after he has paid his fare, and is in a situation, by the act of the carrier, which does not admit of his declining the conveyance and reclaiming his baggage. Lechowitzer v. Packet Co., 8 Misc. Rep. 577, 28 N. Y. Supp. 578, affirming 6 Misc. Rep. 536, 27 N. Y. Supp. 140. Where the condition is in the English language, and the passenger is a German, who does not understand the English language, it is incumbent on the carrier to prove the knowledge by the passenger of the limitation. Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67.

[4] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647. A statement on a baggage check, delivered to a passenger, limiting the company's liability, is of no effect. Such a statement is a mere notice, and the company's liability can only be limited by express contract, if at all. Indianapolis & C. R. Co. v. Cox, 29 Ind. 360.

loss of baggage, but the question is one of fact for the jury.[5] So it has been held that a condition in a passenger's ticket that the company will not be responsible for his baggage beyond its own line is not valid, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances are such that the omission of the passenger to read the condition is negligence per se.[6]

With respect to steamship tickets, a more liberal rule in favor of the carrier seems to prevail. A stipulation in a steamship ticket that the carrier shall not be liable for loss of baggage except when occasioned by gross negligence is binding on the passenger, though he may in fact not have read the ticket.[7]

[5] Malone v. Railroad Co., 12 Gray (Mass.) 388.

[6] Mauritz v. Railroad Co., 23 Fed. 765; Wilson v. Railroad Co., 21 Grat. (Va.) 654. But in Marmorstein v. Railroad Co., 13 Misc. Rep. 32, 34 N. Y. Supp. 97, it is said: "The ticket given the owner of baggage, at the time he pays for his baggage, if received and kept by him, prima facie charges him with knowledge of its contents; and if it exempts the initial company from liability on a connecting line, he cannot recover from the initial company for loss of baggage on such line."

[7] Steers v. Steamship Co., 57 N. Y. 1. The court said: "Looking to the course of business, the court may take notice that an engagement for a voyage across the Atlantic is a matter of more deliberation and attention than buying a railroad ticket, or taking an express company's receipt for baggage and freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract when he supposes himself only to be taking a token indicative of his rights." A stipulation, in the ticket of a passenger on an ocean vessel, that the ship will not be accountable for baggage unless bills of lading have been signed therefor, is valid and binding on the passenger; and a further stipulation allowing each passenger to have 20 cubic feet of luggage free does not modify the first stipula-

§ 630. LIMITATION AS TO VALUE OF BAGGAGE.

A clause in a passenger's ticket limiting the carrier's liability for loss of baggage to a certain sum, unless a bill of lading or receipt be signed therefor, specifying the articles and their respective values, is valid; and, where no such specification is made, the carrier's liability does not exceed the stipulated sum, even though the baggage was lost by the negligence of its servants. This is the rule that has been adopted in New York[1] and in England.[2] It would seem to be sound in principle,

tion. The fact that the shipowner offered the passenger no bill of lading does not abrogate the condition, in the absence of any request by him for one. Wilton v. Steamship Co., 10 C. B. (N. S.) 453. Where a steamer ticket has plainly printed on its face the words "See back of ticket," the passenger is bound by a condition on the back that the carrier is not responsible for loss resulting from shipwreck or disaster of the sea, though a statute requires such condition to be printed on the face of the ticket. Wood v. Allan, 1 Russ. & G. 477.

§ 630. [1] Steers v. Steamship Co., 57 N. Y. 1. But where a passenger discloses the contents of his trunk to a steamer's agent, and pays extra compensation for its transportation, a limitation in the ticket as to value for loss of baggage does not apply. Wasserberg v. Steamship Co., 8 Misc. Rep. 78, 28 N. Y. Supp. 520; Glovinsky v. Steamship Co., 6 Misc. Rep. 388, 26 N. Y. Supp. 751, affirming 4 Misc. Rep. 266, 24 N. Y. Supp. 136.

[2] A condition in a ticket issued to a passenger on depositing his luggage in a cloak room at the station of his destination, exempting the company from liability for loss of any package exceeding £5 in value, unless the value is declared and an extra charge paid, protects the company even where its servants neglected to put the luggage in the cloak room, but left it in a vestibule, without any other protection, whence it was stolen. Harris v. Railway Co., 1 Q. B. Div. 515. So a delivery to the wrong person of luggage deposited in the cloak room is a "loss" of the luggage, within the meaning of such a condi-

since by making the required disclosure the passenger would be entitled to recover the full value of his baggage, and the carrier would be enabled to take precautions, proportionate to the value of the baggage, to protect itself from loss. But in some of the states of this country it is held that a stipulation that the carrier shall not be liable for loss of baggage in excess of a named sum will not relieve it from payment of the full value of baggage lost through the negligence of its servants.[3] So the supreme court of Canada has held that a stipulation in a round-trip ticket, sold at a reduced rate, limiting the liability of the railroad company to $100 for loss of baggage, is not binding on the passenger, though he signed the ticket, where the loss is caused by the company's negligence, and where the passenger was ignorant of the limitation of liability, and such limita-

tion in the deposit ticket. Skipwith v. Railroad Co., 59 Law T. (N. S.) 520. A condition in such a ticket that the company will not be responsible for any package exceeding £10 in value protects the company, not only for the loss of such an article, but also for delay in its delivery, at least where the delay is caused by no willful act or default of the company, and without its privity or knowledge. Pepper v. Railroad Co., 17 Law T. (N. S.) 469. But a rule limiting the amount of baggage for each passenger to a certain weight permits a husband and wife traveling together to take, between them, double the weight permitted to a single passenger. Great N. Ry. Co. v. Shepherd (1852) 21 Law J. Exch. 114.

[3] Coward v. Railroad Co., 16 Lea (Tenn.) 225; Indianapolis & C. R. Co. v. Cox, 29 Ind. 360. There is no necessary conflict between these decisions and the New York and English cases. If no opportunity is given the passenger to disclose the value of his baggage, such a limitation is undoubtedly subject to the same objections that apply to contracts stipulating for total immunity for losses caused by the negligence of the carrier's servants.

tion was not brought to his notice.[4] In Iowa, a contract limiting the liability of a railroad company for loss of baggage to a sum named is in contravention of statute.[5]

§ 631. SAME—MODE IN WHICH LIABILITY MAY BE LIMITED.

It was long ago held in England that a notice posted up in the carrier's office limiting his responsibility to a certain sum for passenger's baggage, in the absence of disclosure of the value, is not binding on the passenger, unless it is shown that he had knowledge of the notice.[1] But where a railroad company issues a ticket to a passenger for luggage deposited in its cloak room, on the face of which is printed "See back," and on the back of which is a condition exempting the company from responsibility for any package exceeding a specified sum in value, the passenger is bound by the condition, if the jury believes that the company did that which was reasonably sufficient to give plaintiff notice of the condition, though as matter of fact plaintiff did not read the condition, or know that it was on the ticket.[2] In other

[4] Bate v. Railway Co., 18 Can. Sup. Ct. 697, reversing 15 Ont. App. 388, and 14 Ont. 625.

[5] Davis v. Railway Co., 83 Iowa, 744, 49 N. W. 77.

§ 631. [1] Brooke v. Pickwick (1827) 2 Bing. 218. In this case, Best, C. J., said: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in their hands a printed paper specifying the precise extent of their engagement."

[2] Parker v. Railway Co., 2 C. P. Div. 416. Bramwell, J., dissented, on the ground that plaintiff was bound to know the condition as mat-

cases, it has been held that the passenger is absolutely bound by the condition, though he has no actual knowledge of it.[3]

In this country, the federal circuit court of appeals for the Second circuit has made a distinction between a condition in a ticket entirely exempting the carrier from its common-law liability and a condition limiting its liability to a specified sum, unless the value is disclosed and extra compensation paid. "A condition on the back of a passenger's ticket limiting the carrier's common-law liability for injury or loss of baggage is invalid, where the passenger had no notice of the condition, though the face of the ticket contained the words 'See back.' But a condition on the back of such a ticket limiting the carrier's liability for luggage to £10 unless extra payment is made is valid, as it is a mere regulation for the conduct of business. The regulations or the notices upon its tickets or contracts which bring this class of limitations home to the knowledge of the passenger are of a very different character from the notices of which we have been speaking, and which limit or attempt to annihilate the common-law responsibility of

ter of law. Among other things, he said. "Let us for a moment forget that the defendants are a caput lupinum,—a railway company. Take any other case,—any case of money being paid and a paper given by the receiver, or goods bought on credit and a paper given with them. * * * Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms of the paper? What more can be done? Must he say, 'Read that'? As I have said, he does so in effect when he puts it in the other's hands. The truth is, people are content to take these things on trust."

[3] Harris v. Railway Co., 1 Q. B. Div. 515; Van Toll v. Railway Co., 12 C. B. (N. S.) 75.

the common carrier. This class of regulations is intended to make certain what is uncertain, to define what is otherwise indefinite, to prevent mistakes, complaint, and litigation, and to promote fairness of dealing." [4] But elsewhere in this country the same rule applies to both kinds of limitations.[5]

§ 632. STATUTORY LIMITATION OF LIABILITY.

An act of congress, passed March 3, 1851,[1] provides that if any shipper of certain enumerated articles, including platina, gold dust, bank bills, coin, jewelry, precious metals, precious stones, etc., shall lade the same on board of any vessel without notice to the master or agent of the true character and value thereof, the master and owners shall not be liable as carriers in any

[4] The Majestic, 9 C. C. A. 161, 60 Fed. 624, modifying 56 Fed. 244.

[5] A notice that a railroad corporation will not be liable for the baggage of passengers beyond a certain amount, printed on the back of the passage ticket, and detached from what ordinarily contains all that is material for the passenger to know, does not raise a legal presumption that the passenger, at the time of receiving the ticket, and before the train leaves the station, had knowledge of the limitations and conditions which the carrier had attached to the transportation of the baggage of passengers; but it is a question for the jury whether plaintiff knew of the notice before commencing the journey. Brown v. Railroad Co., 11 Cush. (Mass.) 97. A clause in a railroad ticket limiting the company's liability to $100 for loss of baggage is not binding on the purchaser, unless, with knowledge of such limitation, he agrees to it. Kansas City, St. J. & C. B. R. Co. v. Rodebaugh, 38 Kan. 45, 15 Kan. 899. A provision in a passenger's ticket limiting the carrier's liability for loss of baggage to $100 does not constitute a contract with the passenger, but is a mere notice, and is not binding. Nevins v. Steamship Co., 4 Bosw. (N. Y.) 225.

§ 632. [1] 9 Stat. U. S. 635, § 2.

form or manner. It was held that this statute, as originally enacted, did not apply to the baggage of passengers.[2] The statute was subsequently amended by enlarging the number of articles, and by extending its scope to all of these articles laden as "freight or baggage."[3] As thus amended, there would seem to be no room for doubt that the statute applies to passenger's baggage. But, in view of the fact that the statute relieves the vessel owner from liability only "as carrier thereof in any form or manner," the New York court of appeals has recently held that the vessel owner is relieved only from his liability as insurer when the property has not been entered in the bill of lading, and that it does not affect his liability as bailee for hire, and therefore the vessel owner is liable as bailee for hire

2 Dunlap v. Steamship Co., 98 Mass. 371; Brock v. Gale, 14 Fla. 523.

3 The statute, as thus amended, is section 4281 of the Revised Statutes. It reads as follows: "If any shipper of platina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks or time pieces of any description, trinkets, orders, notes or securities for the payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel or package, or trunk, shall lade the same as freight or baggage on any vessel, without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value, and according to the character thereof, so notified and entered."

when it is shown that the property was lost through his negligence.[4]

Still another statute [5] exempts vessel owners from personal liability for loss or damage to "goods or merchandise" by means of fire not caused by the neglect of the owners. It has been held that a passenger's baggage is "goods or merchandise," within the meaning of this statute.[6]

In England it has been held that a statute limiting the liability of a railway company for the loss of passenger's luggage to £10, unless the value is declared and an increased charge paid, applies, though the railway company has contracted to carry partly by land and partly by sea. The contract is divisible, and as to the land journey the carrier is protected.[7] In this country it has been recently held that a statutory limitation as to the amount of a passenger's baggage for which a railroad company shall be liable, unless it is paid an extra compensation for carrying it, is confined solely to its obligation as carrier, and not to its obligation as warehouseman. Hence, where the baggage is lost through its negligence while in its custody as warehouseman, the passenger may recover its entire value, though it exceeds the statutory amount.[8]

[4] Wheeler v. Navigation Co., 125 N. Y. 155, 26 N. E. 248.

[5] Act March 3, 1851, § 1, now section 4282 of the Revised Statutes.

[6] Chamberlain v. Transportation Co., 44 N. Y. 305, reversing 45 Barb. 218.

[7] Le Conteur v. Railway Co., L. R. 1 Q. B. 54.

[8] Wiegand v. Railroad Co., 75 Fed. 370, affirmed 79 Fed. 991.

§ 633. CONFLICT OF LAWS AS TO LIMITATION OF LIABILITY.

We have seen that, if a contract limiting the carrier's liability for injuries to the person of the passenger is valid under the laws of the country where made, it will be enforced in a state where such a contract, if made there, would be declared invalid as against public policy.[1] Accordingly, it has been held that where a person enters into a contract in England for transportation to a colony where the French law prevails, a stipulation in the contract limiting the carrier's liability for loss of baggage depends for its validity on the law of England, and not on that of France.[2] In New York, however, it has been held that the true principle is that, when the law of the place of performance of a contract is different from that of the place of making it, it is to be construed according to the law of the place where it is to be performed; and therefore, where baggage is delivered to a carrier in Pennsylvania to be transported to New York, a Pennsylvania statute limiting the carrier's liability as to amount of baggage does not control the contract of carriage, but the rights of the parties must be determined by the laws of New York, where delivery is to be made.[3]

In the absence of any showing as to what the laws of another state are, it will not be presumed that they per-

§ 633. [1] See ante, § 398.

[2] Peninsular & O. S. Nav. Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 290.

[3] Curtis v. Railroad Co., 74 N. Y. 116.

mit a common carrier to contract against his own negligence.[4]

§ 634. CARRIER'S LIEN FOR FARE.

At common law, a carrier has a lien on the passenger's baggage for his fare, and the carrier may retain the baggage until the fare is paid.[1] As we have seen, however, the carrier has no lien on the person of the passenger,[2] nor on the wearing apparel on his person.[3] During the period that a carrier retains a passenger's trunk in its possession under a lien for fare, it continues liable therefor as an insurer, and not as a warehouseman.[4]

§ 635. GENERAL AVERAGE CONTRIBUTION.

Passengers' baggage, sacrificed in putting out a fire on a steamer, is to be contributed for in general average. While passengers' baggage in daily use does not contribute to general average, baggage stored in the ship's compartment, and not in use, does contribute.[1]

4 Stevenson v. Car Co. (Tex. Civ. App.) 32 S. W. 335. See, also, Davis v. Railroad Co., 83 Iowa, 744, 49 N. W. 77.

§ 634. 1 Rumsey v. Railroad Co., 14 C. B. (N. S.) 650; Wolf v. Summers, 2 Camp. 631; Roberts v. Koehler, 30 Fed. 94. The lien also exists under the California and Montana Codes. Civ. Code Cal. § 2191; Civ. Code Mont. 1895, § 2900.

2 See ante, § 273.

3 Wolf v. Summers, 2 Camp. 631.

4 Southwestern R. Co. v. Bently, 51 Ga. 311.

§ 635. 1 Heye v. North German Lloyd, 33 Fed. 60, affirmed in 36 Fed. 705.

CHAPTER XLI.

PROPERTY IN PASSENGER'S CUSTODY.

§ 636. Carrier's Liability.
637. Same—Railroad Companies.
638. Same—Steamboats and Vessels.
639. Same—Sleeping Cars.
640. Same—Liability of Railroad Company for Loss of Articles from Sleeping Car.
641. Same—Articles Left in Car.
642. For What Property Liable.
643. Contributory Negligence of Passenger.

§ 636. CARRIER'S LIABILITY.

By the weight of authority in this country, a common carrier of passengers is not liable as an insurer for articles of baggage not delivered into its exclusive custody and control; but it is liable, as a bailee for hire, for the loss of or injury to such articles by its negligence. In England, however, it would seem that carriers are liable as insurers for even such articles of baggage, while in New York carriers by steamboat are so liable.

In the early cases on this subject in this country, the theory of the courts seems to have been that the liability of carriers for the baggage of a passenger is limited to such property as is delivered to the care and custody of the carrier, or his agents and servants, during the transportation, and that it did not extend to arti-

cles which the passenger retained in his charge.[1] And even at the present time the California Code [2] provides that, when passengers neglect or refuse to have their baggage checked, it is carried at their own risk. In this connection, the doctrine of the courts as to ferrymen is worthy of note. It was long ago held that with respect to property which a passenger on a ferryboat takes with him for transportation, and of which he retains control and management, the ferryman is at least liable for negligence, though not as insurer.[3] A rule entirely analogous has been adopted in the United States with respect to baggage in the passenger's custody, barring some exceptions presently to be noticed.

§ 637. SAME—RAILROAD COMPANIES.

The English rule on this subject was thus stated in 1888 by Lord Chancellor Halsbury: [1] "A railway company, in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default." As

§ 636. [1] The Crystal Palace v. Vanderpool (1855) 16 B. Mon. (Ky.) 302; The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690.

[2] Civ. Code Cal. § 2183; Civ. Code Mont. 1895, § 2893.

[3] Dudley v. Ferry Co., 45 N. J. Law, 368, affirming 42 N. J. Law, 25; Wyckoff v. Ferry Co., 52 N. Y. 32, and cases there cited.

§ 637. [1] Great Western Ry. Co. v. Bunch, 13 App. Cas., at page 42.

long ago as 1801, it was said by an English judge [2] that "if a man travel in a stagecoach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." In 1849 it was held that the fact that a dressing case is placed under the seat of a passenger in a railway compartment, and so under the more immediate control and inspection of the passenger, makes no difference as to the carrier's liability as insurer.[3] This principle has been reiterated in subsequent cases,[4] and has also been adopted in Canada.[5] In Tally v. Railway Co., decided in 1870, it was held, however, that where a passenger's luggage is placed, at his request, by a railway company, in the carriage in which he is traveling, the company's contract to carry it safely is subject to an implied condition that he takes ordinary care of it, and if his negligence causes its loss the company is not liable.[6] The only English case at variance

[2] Chambre, J., in Robinson v. Dunmore, 2 Bos. & P., at page 419.

[3] Richards v. Railway Co., 7 C. B. 839, 859.

[4] Great Northern Ry. Co. v. Shepherd (1852) 8 Exch. 30; Le Conteur v. Railway Co. (1865) L. R. 1 Q. B. 54.

[5] Gamble v. Railway Co. (1865) 24 U. C. Q. B. 407, affirmed in 3 U. C. Err. & App. 163.

[6] Talley v. Railroad Co. (1870) L. R. 6 C. P. 44. A passenger whose portmanteau had been placed, at his request, in the carriage with him, got out at an intermediate station on his journey, and, having negligently failed to find the same carriage again, finished his journey in a different one. Held, that the company was not responsible for the robbery of the portmanteau, during the latter part of the journey, by persons in the carriage, without negligence on its part. Id.

with these views is Bergheim v. Railway Co.,[7] decided in 1878 by the common pleas division, where it was held that a common carrier is not liable as insurer for the loss of a passenger's luggage placed, at his request, in the carriage in which he travels, since the carrier has not the exclusive, or at least the absolute, care and control of the goods. As to such luggage, however, the company is a bailee for hire, and is therefore liable for loss or injury caused by its negligence, but not otherwise. This case, however, was disapproved in Great Western Ry. Co. v. Bunch, heretofore cited, and is probably no longer considered as law in England.

In this country, the rule, without exception, is that, although a railroad company is not responsible as a common carrier for an article of baggage kept by a passenger exclusively within his own control, it is liable for the loss of such an article by the negligence of the corporation, or its agents or servants, and without the fault of the passenger.[8] The first case on this subject in this country seems to have been decided in 1844 in the state of New York, where it was held that a rail-

[7] 3 C. P. Div. 221.

[8] Kinsley v. Railroad Co., 125 Mass. 54. A passenger, on leaving the car at a station for the purpose of getting his dinner, inquired of an employé whether his baggage would be safe if left in the car, and was told to leave it there, and that it would be perfectly safe. He accordingly left his baggage, and, on his return, found that the car had been detached from the train, and his baggage removed to another car, where he could have a seat. On going to this car, he found only part of his baggage. No notice of the change had previously been given him. Held, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the railroad company. Id.

road company is not liable for the theft of an overcoat which a passenger laid on a seat, and forgot to take with him when he left the car at his destination.[9] So the supreme court of the United States has held that a railroad company is not responsible for the loss of a bag containing money and jewelry, carried in the hand of a passenger, and by her accidentally dropped through a car window which she was endeavoring to close, although, upon notice of the loss, it refused to stop the train, short of the next station, to enable her to recover it.[10] But a railroad company is liable for the loss of money contained in a passenger's coat, which he had laid across the back of his seat, and which was thrown out of the window by the overturning of the coach through the negligence of the company.[11]

[9] Tower v. Railroad Co., 7 Hill (N. Y.) 47. In this case it was said: "The passenger must at least assume responsibility of taking ordinary care of himself, including the wearing apparel about his person. There is certainly no hardship in this, unless he is to be regarded by the law as becoming at once inops consilii the moment he enters a car or stagecoach. If the defendant were under any obligation to take charge of the article in question after it was discovered in the car (and it is not necessary to deny that it was), ordinary care is all that can be exacted, and that was sufficiently established."

[10] Henderson v. Railroad, 123 U. S. 61, 8 Sup. Ct. 60, affirming 20 Fed. 430. The court said: "Even if no negligence is to be imputed to her in attempting to shut the window with the bag in her hand, yet her dropping the bag was not the act of defendant or its servants, nor anything that they were bound to foresee and guard against; and after it had happened she had no legal right, for the purpose of relieving her from the consequences of an accident for which they were not responsible, to require them to stop the train short of a usual station, to the delay and inconvenience of other passengers, and the possible risk of collision with other trains."

[11] Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

§ 638. SAME—STEAMBOATS AND VESSELS.

In the earlier cases in which the liability of steamboat proprietors for the safety of baggage retained within the control of the passenger was considered, it seems to have been thought that no liability whatever, not even for negligence, attached to the carrier. "Their liability as to such articles only attaches on delivery to them as baggage." [1] But the rule in most of the states of the Union now is that a carrier by steamboat is liable for the loss of such baggage through its negligence, but that it is not liable as a common carrier of baggage, nor as an innkeeper, though the passenger has paid a round sum for transportation, lodging, and food.[2] In New York, however, a different

§ 638. [1] The Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302. In this case it was held that the fact that wearing apparel and money are stolen from a passenger while asleep in his berth, and that the employés on the boat knew that the lock of the stateroom was out of order, does not make the steamboat owner liable. In McKee v. Owen, 15 Mich. 115, it appeared that a passenger on a steamboat was robbed of her money and some jewelry during the night, while asleep in her berth. On the trial in the lower court, there was a judgment for defendant, on the theory that there had been no delivery of the property to the carrier. This judgment was affirmed by an equally divided court. Christiancy and Cooley, JJ., dissenting.

[2] Clark v. Burns, 118 Mass. 275. In the absence of negligence, a steamboat carrier is not liable for the theft of jewelry from the stateroom of a passenger during the night. Del Valle v. The Richmond, 27 La. Ann. 90. A steamship company is liable for the theft of a passenger's valise from his stateroom during the night, if it was guilty of negligence. American Steamship Co. v. Bryan, 3 Wkly. Notes Cas. (Pa.) 528. A steamboat is liable for the theft of a passenger's watch and money in the nighttime from the stateroom, which has been properly

view has finally prevailed. In a very recent case, the court of appeals for that state has held that a carrier by steamboat is liable as insurer for the passenger's personal effects, stolen, without negligence on his part, from the stateroom during the night, since the relation between the carrier and the passenger in such a case is virtually that of an innkeeper and guest. No negligence on the part of the carrier need be shown.[3] In distinguishing the case of a carrier by steamboat from that of a carrier by railway or by sleeping car, the court said: "The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a

locked. The fact that the thief had time and opportunity to enter a stateroom of the ladies' cabin, which, it is shown, was properly fastened, exhibits a want of that care and watchfulness which should always be observed in the police regulations of every boat engaged in the transportation of passengers. Walsh v. The H. M. Wright, Newb. Adm. 494, Fed. Cas. No. 17,115.

[3] Adams v. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, affirming 9 Misc. Rep. 25, 29 N. Y. Supp. 56.

private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at an hotel. The two relations, if not identical, bear such close analogy to each other that they cannot be distinguished." [4] Previous to this decision the inferior courts in New York had repeatedly held that a carrier by steamboat is liable as an innkeeper for the wearing apparel of a passenger of which he divests himself at night on retiring to his berth in his stateroom, and it can excuse itself only by showing that the passenger was guilty of contributory negligence.[5]

[4] It is perhaps questionable whether there is such a difference in fact between a carrier by steamboat and a carrier by railway, which undertakes to transport a passenger across the continent, and to furnish him with dining-car and sleeping-car facilities, as to justify this radical variation in principle.

[5] Crozier v. Steamboat Co., 43 How. Prac. (N. Y.) 466; Mudgett v. Steamboat Co., 1 Daly (N. Y.) 151; Gore v. Transportation Co., 2 Daly (N. Y.) 254. Where the officers of a ship do not require all the passenger's baggage to be deposited in a specific place, the fact that a passenger, on a voyage from Europe to New York, keeps his trunk in his stateroom, does not relieve the vessel owner from his liability as carrier of baggage. Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453. But in Cohen v. Frost, 2 Duer (N. Y.) 335, it was held that a steerage passenger, who takes his trunk into the steerage with him, places it under his bed, and fastens it with ropes to his berth, cannot recover for its theft during the voyage, since he has the exclusive possession and care of it, and trusts to his own care and vigilance to protect himself against loss. In Crozier v. Steamboat Co., supra, it was said: "The rule requiring an actual delivery of a passenger's baggage to the carrier is inapplicable to the wearing apparel on a passenger's person when he retires to his stateroom at night. In such a case the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all vigilance and precaution which men habitually practice when awake, and to intrust his person, and what-

§ 639. SAME—SLEEPING CARS

While a sleeping-car company is not liable, either as an innkeeper or as a common carrier, for the loss of a passenger's effects, it is its duty to protect, by reasonable watch, the occupant of a berth in its car, while asleep, in his person and property; and it is liable to such occupant for its negligence or want of reasonable care in the protection of his personal goods and money.[1] It has been well said, by the New York court

ever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation, and receive the reward for the comfort thus afforded, will themselves exercise."

§ 639. [1] Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474; Kates v. Car Co., 95 Ga. 810, 23 S. E. 186; Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615; Efron v. Car Co., 59 Mo. 641; Hampton v. Car Co., 42 Mo. App. 134; Scaling v. Car Co., 24 Mo. App. 29; Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, affirming 14 Daly (N. Y.) 457; Sessions v. Railroad Co., 78 Hun, 541, 29 N. Y. Supp. 628; Welch v. Car Co., 1 Buff. Super. Ct. 457; Welding v. Wagner, 1 City Ct. R. (N. Y.) 66; Tracy v. Car Co., 67 How. Prac. 154; Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78; Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70; Pullman Palace-Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744; Stevenson v. Car Co. (Tex. Civ. App.) 32 S. W. 335; Blum v. Car Co., 1 Flip. 500, Fed. Cas. No. 1,574; Stearn v. Car Co., 8 Ont. 171. In Pullman Palace-Car Co. v. Smith, 73 Ill. 360, it was held that a sleeping-car company is liable neither as an innkeeper nor as a common carrier for the loss of a passenger's money which was stolen from his berth while he was asleep therein. In Nebraska, however, it is held that a sleeping-car company, so far as it renders services similar in kind to those of an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the custody of the porter, who put it in the berth above the one occupied by the passenger, the company is liable for its theft while the passenger was

of appeals:[2] "A corporation engaged in running sleeping coaches, with sections separated from the aisle only by curtains, is bound to have an employé charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. The cars are used by both sexes, of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by carriers; and though such companies are not insurers, they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited, and has the right, to sleep; and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult; and the company is bound to use a degree of care commensurate with the danger to which the passenger is exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous."

This duty of keeping watch is not confined to the time while the passenger is asleep in his berth, but extends also to the period while he is absent from his berth, in the washing room, preparing his toilet on arising in the morning.[3] Nor is the sleeping-car company relieved from this duty of exercising watch and

absent from the car at breakfast. Pullman Palace-Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226.

[2] Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, affirming 14 Daly (N. Y.) 457.

[3] Root v. Car Co., 28 Mo. App. 199.

guard by the fact that the car is leased to the railroad company, to whom the fare for the transportation is paid.[4]

Since the duty rests on the sleeping-car company to keep watch over sleeping passengers, it follows that, if the servant or agent of the company charged with this duty steals the property himself, the company is responsible.[5]

As a general rule, it is held that the mere proof of loss of personal baggage of a passenger while occupying a berth in a sleeping car does not make out a prima facie case, and to sustain a recovery some evidence of negligence on the part of defendant must be given.[6] But the fact that the porter was the only employé on

[4] Pullman Palace-Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814.

[5] Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70. Whether we treat a sleeping-car company as a common carrier of passengers, or treat it as an innkeeper, or treat it as a simple lodging-house keeper, hiring its space for an agreed consideration for sleeping apartments for a determinate period, it is responsible for personal jewels and belongings of a passenger appropriate for his or her social position and financial standing, carried by such passenger while traveling thereon, and for his or her convenience, comfort, or personal adornment, to the extent at least of making good to such person any loss resulting from a theft of such property by its own employés, while such person was under their protection. It guaranties at least that, while enjoying the comfort afforded by the car of the defendant, a person traveling thereon shall not be robbed by its employés. Pullman Palace-Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700. Where the porter of a sleeping car, in pursuance of his duties and custom, takes charge of a passenger's baggage, for the purpose of removing it from the car at the passenger's destination, the car company becomes liable therefor, if such baggage is lost or stolen through the negligence of its employés. Voss v. Car Co. (Ind. App.) 44 N. E. 1010, 43 N. E. 20.

[6] Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277; Welding v.

the car, which ran over an important thoroughfare, and stopped at numerous stations during the night; that, in addition to his duties for the company, he was permitted to render services to passengers for his own profit, and presumptively assisted passengers in entering and leaving the coach at intermediate stations, makes out a prima facie case of negligence.[7] So the fact that two larcenies were committed in a sleeping car during one night, that the porter was found asleep in the car in the early morning, and that he was required by the company to be on duty for 36 hours continuously, is sufficient evidence of negligence to require the case to be submitted to the jury.[8] In Georgia, however, it has been held that, if a loss occurs, the burden of proof is on the company of showing that it exercised proper diligence, and that the loss was not occasioned because of a failure on the part of its employés to do so.[9]

Wagner, 1 City Ct. R. (N. Y.) 66; Tracy v. Car Co., 67 How. Prac. (N. Y.) 154; Bevis v. Railway Co., 26 Mo. App. 19; Stearn v. Car Co., 8 Ont. 171.

[7] Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, affirming 14 Daly (N. Y.) 457. Where it appears that the thief must have stood in the aisle of the car while committing the theft; that the thief must have pulled plaintiff's vest from under his pillow, unfolded it, taken out money and jewelry, folded it up again, and placed it back; and that the porter was on watch in a position where he was able to overlook the car all night,—the jury is warranted in finding negligence. Bevis v. Railway Co., 26 Mo. App. 19.

[8] Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615.

[9] Kates v. Car Co., 95 Ga. 810, 23 S. E. 186.

§ 640. SAME—LIABILITY OF RAILROAD COMPANY FOR LOSS OF ARTICLES FROM SLEEPING CAR.

As we have seen, a railroad company is liable for the negligence of the employés on a sleeping car forming part of its train, if such negligence produces injury to the person of the passenger.[1] On the same principle, if a passenger on a railroad entitled to ride in a sleeping car there loses an article of personal baggage through the negligence of the sleeping-car employés, the railroad company, which undertook to transport him, is liable, even though the sleeping car is owned by third persons, who, under a contract with the railroad company, provided conductors and servants.[2] So, a railroad company is liable for the loss of a passenger's valise, which, on entering a sleeping car, he turned over to the porter, though the porter was prohibited from taking charge of such baggage by a rule of the sleeping-car company, and though the contract between the railroad company and the sleeping-car company exempted the railroad company from liability for baggage in sleeping cars. The railroad company cannot escape liability as common carrier by delegating a part of its duties to the sleeping-car company.[3]

§ 640. [1] See ante, § 378.

[2] Kinsley v. Railroad Co., 125 Mass. 54.

[3] Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea (Tenn.) 380, 1 S. W. 44. A ticket for a berth in a sleeping car, stating that "wearing apparel or baggage placed in the car will be entirely at risk of owner," has no bearing in an action against the railroad company for loss of baggage while in the sleeping car. Id.

§ 641. SAME—ARTICLES LEFT IN CAR.

A common carrier of passengers is bound to exercise ordinary care to discover and take care of articles of baggage inadvertently left by the passenger in the carrier's conveyance.[1] On this subject, the supreme court of Georgia [2] has recently said: "It very frequently happens that a passenger in a sleeping car, upon leaving the same, casually leaves in the car some article of personal property. When this occurs, the article so left does not become the property of the company, but, on the contrary, it is under a duty of exercising at least some care in looking out for and taking care of an article that is thus left, and, if possible, of restoring it to the owner when thus ascertained. We do not think that the rule of extraordinary diligence applies in such a case, but certainly it is not requiring too much of the company to hold it bound to be at least ordinarily careful in discovering, taking care of, and restoring property thus left in a car. It is unquestionably true that, when such property is found by a servant of the company, he is bound to take care of it; for this is nothing more than common honesty requires, a failure to observe which would not excuse the company. A less stringent rule is applicable when it does not appear that the property in question is actually found by a serv-

§ 641. [1] Tower v. Railroad Co. 7 Hill (N. Y.) 47. But a passenger who, on alighting, leaves a plaid in the carrier's vehicle, which is lost without the carrier's fault, cannot hold the carrier liable for its value. Ramsey v. Bell, 1 Prince Edwards Is. 417.

[2] Kates v. Car Co., 95 Ga. 811, 23 S. E. 186.

ant of the company, but is left or dropped in such place, or under such circumstances, as would enable the servants of the company, by the exercise of ordinary care, to discover it. In the latter case, the duty would still be on the company of showing that it did in fact exercise that degree of care in the premises." So where a street-car company, by a general regulation, makes it the duty of its agents to take charge of property inadvertently left in its cars, and provides a place in its depot for the safe-keeping of such property, where the owner may apply for it, it must be deemed a part of its business to take charge of such articles, and keep them for the passenger. And although a street-car company does not engage for the carriage of baggage, yet where it takes charge of a passenger's property inadvertently left in its car, it is liable for its safe-keeping as a bailee for hire, the specific compensation paid as fare being a sufficient consideration. But in such a case the mere fact of delivery of the articles to a wrong person does not render the company liable for their value, if it exercised all the care and vigilance that could reasonably be expected of it under the circumstances.[3]

[3] Morris v. Railroad Co., 1 Daly (N. Y.) 202.

§ 642. FOR WHAT PROPERTY LIABLE.

The duty of a carrier to exercise care for property in the passenger's custody extends only to such clothing, ornaments, and articles as are usually carried by passengers for their personal comfort and convenience during the journey, and for such a sum of money as may be deemed reasonably necessary for traveling expenses. As to all other property in the passenger's custody, no duty of care exists.

The carrier's liability for property in the passenger's custody does not extend beyond the clothing, ornaments, and such articles as are usually carried by travelers about their persons, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged.[1] The liability of the carrier is not, however, confined to such articles of wearing apparel as are used on the train, but extends to articles which a passenger has packed in her valise, in the expectation of using them at an intermediate station, where she intends to stop off and visit with a friend for a day or two.[2] So a gold watch and gold spectacles, carried in a valise by a female passenger, are proper ar-

§ 642. [1] Illinois Cent. R. Co. v. Handy, 63 Miss. 609. The carrier is liable for such articles as are usually carried by a passenger about his person, and for such a sum as may be deemed reasonably necessary for traveling expenses; but for any sum beyond this it is not responsible. Blum v. Car Co., 1 Flip. 500, Fed. Cas. No. 1,574.

[2] Hampton v. Car Co., 42 Mo. App. 134.

ticles of hand baggage, for the theft of which, through the carrier's negligence, the carrier is liable.[3]

But, under the ordinary contract of carriage, a carrier of passengers enters into no duty as to articles of property of great value, forming no part of passengers' ordinary baggage or personal equipment. Hence a railroad company is not liable where a passenger on its train is robbed of $16,000 worth of negotiable securities, though its servants may have been negligent.[4] Neither is a railroad company liable for the destruction of a large amount of bank notes on the person of a passenger who perished in a railroad wreck, and whose body was burned in a fire accidentally started in the wreck.[5]

[3] Walsh v. The H. M. Wright, Newb. Adm. 494, Fed. Cas. No. 17,115.

[4] Weeks v. Railroad Co., 72 N. Y. 50, affirming 9 Hun (N. Y.) 669.

[5] First Nat. Bank of Greenfield v. Marietta & C. R. Co., 20 Ohio St. 259. In this case it was said: "We do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for their transportation. But he can do so only at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants, is concerned. For this secret method of transportation would be a fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of parcels never delivered to him for transportation, and of which he has no knowledge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself." A carrier of passengers is not liable for money in excess of the passenger's reasonable requirements for the journey, carried by him in his overcoat pocket, whence it was stolen during the confusion inci-

A sleeping-car company is bound to use reasonable care to protect only so much money carried by a passenger as is necessary and appropriate, in view of his circumstances and condition in life, for his wants and comforts during the contemplated journey, and is not liable if a sum of money, carried for another purpose, is stolen from him through the negligence of its servants, provided no special circumstances exist which impose on it a peculiar duty with reference to such money.[6]

As to an excessive amount of baggage or money in the custody of the passenger, the carrier is not even a gratuitous bailee. It therefore follows that it is not liable for the theft of such property even by its servants, for the reason that, as to such excess, it stands in no contract relation with the passenger, and owes him no duty, nor authorizes its servants to do anything with reference to such property.[7]

dent to the derailment of the train. Hillis v. Railway Co., 72 Iowa 228, 33 N. W. 643.

[6] Barrott v. Car Co., 51 Fed. 796. A sleeping-car company is not liable for the loss of a passenger's valise containing samples of merchandise, where it had no knowledge of its contents. Pfaelzer v. Car Co., 4 Wkly. Notes Cas. (Pa.) 240.

[7] Illinois Cent. R. Co. v. Handy, 63 Miss. 609; Root v. Car Co., 28 Mo. App. 199; Wilson v. Railroad Co., 32 Mo. App. 682.

§ 643. CONTRIBUTORY NEGLIGENCE OF PASSENGER.

Since the carrier's liability for property in the passenger's custody is based on negligence, contributory negligence on the part of a passenger is a defense in an action for its loss, except in cases of theft by the carrier's servants.

Contributory negligence on the part of the passenger in the care of his property manifestly ought to free the carrier from responsibility for its loss. This proposition has been frequently recognized by the courts. Thus, if a passenger, on disembarking at his destination, negligently leaves his overcoat or his pocketbook containing money in the car, the railroad company is not responsible for the property so left, if it be stolen by some one not in the employ of the company, unless an agent of the company discovered, before the theft, that such property had been left.[1] So a passenger on a steamboat, who deposits his valise in his stateroom, and leaves the room without locking the door, is guilty of negligence,[2] though no key has been furnished him;[3] and he cannot recover for the loss of his valise by theft during his absence. So a passenger who leaves a car

§ 643. [1] Illinois Cent. R. Co. v. Handy, 63 Miss. 609; Tower v. Railroad Co., 7 Hill (N. Y.) 47.

[2] The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690.

[3] Gleason v. Transportation Co., 32 Wis. 85. A passenger whose money is stolen during the night from the stateroom of a steamer cannot recover for its loss, where he negligently failed to bolt the door, though he locked it. The John Brooks, 1 Hask. 439, Fed. Cas. No. 7,335.

at an intermediate station for 10 minutes, permitting her satchel to remain in the car in such a position that it can easily be reached from the outside, is guilty of contributory negligence, and cannot recover for its loss while so absent.[4] So a passenger in a sleeping car, who leaves his valuables in his berth while he is in the toilet room, is guilty of contributory negligence, as matter of law, if they are stolen in his absence; but it is otherwise if he directs the porter in charge of the car to look after his effects in his absence.[5]

But it is not negligence, as matter of law, for a passenger, retiring in his berth on a steamer, to retain money on his person, though there is a safe on the steamer in which passengers may deposit their valuables.[6] So the act of a passenger, on a warm day, in taking off his coat, containing $240 in money, and laying it across the back of his seat, is not such contributory negligence as will preclude a recovery for the loss of the money, caused by the overturning of the coach through the negligence of defendant's servants, whereby the coat was thrown out of the window.[7]

[4] Whitney v. Car Co., 143 Mass. 243, 9 N. E. 619.

[5] Chamberlain v. Car Co., 55 Mo. App. 474; Root v. Car Co., 28 Mo. App. 199.

[6] Dunn v. Steamboat Co., 58 Hun, 461, 12 N. Y. Supp. 406.

[7] Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010. But where the coat was brought to him as soon as he got out of the overturned coach, and he then noticed that his money was missing, it was his duty to notify the train hands of his loss; and his failure to give notice of his loss to the carrier is such contributory negligence as bars a recovery, since such failure prevented the carrier from taking steps to protect itself, if possible, by a recovery of the money. Id. The mere fact that a passenger on a sleeping car places his clothing,

But contributory negligence in the care of his property by the passenger is no defense in favor of the carrier where the property was stolen by its servants. The duty of the carrier, through its servants, would be to protect the passenger's property, although discovered in an exposed situation, where his carelessness may have left it.[8]

So, also, where it appears that the acts of the passenger alleged to be negligent were caused by the willful misconduct of the company itself, the latter is estopped from claiming immunity because of such acts. Hence, where a passenger on a sleeper, who retires for the night with assurance that the car will go through to his destination, is suddenly aroused during the night for the purpose of hurriedly changing cars, having barely time to secure his clothing, the question whether he was guilty of negligence in not taking proper care to secure his money and valuables is one of fact for the jury, and their finding in his favor will not be disturbed.[9]

containing money, on the unoccupied berth above the one in which he sleeps, is not such contributory negligence, as matter of law, as will bar a recovery for the theft of the articles while he is asleep. Florida v. Car Co., 37 Mo. App. 598.

[8] Root v. Car Co., 28 Mo. App. 199; Pullman Palace-Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744.

[9] Kates v. Car Co., 95 Ga. 810, 23 S. E. 186.

CHAPTER XLII.

ACTIONS PERTAINING TO BAGGAGE.

§ 644. Parties.
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§ 644. PARTIES.

As a general rule, the right of possession is sufficient to entitle a passenger to sue for the loss of baggage by the carrier during the journey, though some one else may in fact be the owner or part owner thereof. Thus, a gentleman in charge of ladies on a train is the proper custodian of their money and personal effects for the journey intrusted to him; and his right to the possession of the property will enable him to sue a sleeping-car company for the theft of the money by one of its porters.[1] So a husband traveling with his wife, who

§ 644. [1] Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70. By issuing a check to two passengers for a chest containing the baggage of both, a railroad company enters into a joint contract with them; and, where the chest and its contents are lost on the journey, the company cannot insist that the contract should be severed, and separate actions brought thereon, to correspond with the ownership of the property, but both owners may sue jointly. Anderson v. Railway

purchases tickets for himself and her, and has his own and her baggage checked to the point of their destination, himself receiving the checks, may sue the railroad company in his own name, without joining the wife, for the loss of the wife's trunk, containing her wearing apparel, and that of her child. In such a case, although the general ownership of the lost trunk and its contents is in the wife, the husband has such a special ownership therein as will entitle him to recover, in his own name alone, the value of such lost trunk and its contents as his damages for the breach of contract made with him for its safe carriage and delivery. Such recovery would bar any subsequent action by the wife.[2] In New York it has been held that, as against strangers, the husband may sue for loss of or injury to his wife's paraphernalia, while being transported as baggage, even under the married woman's statutes.[3]

Co., 65 Iowa, 131, 21 N. W. 485. A partnership cannot sue for injury to its personal property while being carried by a railroad company as the personal baggage of a member of the firm, who was a passenger on the train. If any one can sue, it must be the individual partner for whom the baggage was being carried, since there is no privity of contract between the partnership and the carrier. State v. Knight (N. J. Sup.) 33 Atl. 845. But where a traveling salesman pays an extra compensation to secure the transportation of merchandise in his sample trunks, an action is properly brought in the name of his principal for their loss during transportation. Sloman v. Railroad Co., 67 N. Y. 208, reversing 6 Hun, 546. In such a case, the undiscovered principals have a right to disclose themselves, and sue upon the contract. Lake Shore & M. S. Ry. Co. v. Hochstim, 67 Ill. App. 514.

[2] Jacksonville, St. A. & H. R. Ry. Co. v. Mitchell, 32 Fla. 77, 13 South. 673.

[3] Curtis v. Railroad Co., 74 N. Y. 116. At common law, in the absence of statute, the paraphernalia of a married woman is subject

So a minor may, by his next friend, sue a carrier for the value of lost baggage, consisting of wearing apparel given him by his parents.[4]

A claim for loss of baggage against a common carrier may be assigned, and under the Code the assignee may sue on such claim in his own name without making the assignor a party.[5] But where a passenger's baggage is destroyed on the line of a connecting railroad, an assignment of his claim for damages against that road confers on the assignee no right of action against the original carrier.[6]

§ 645. FORM OF ACTION.

For loss of or injury to baggage during transportation, the passenger may maintain either an action for breach of contract against the carrier, or in tort for breach of its public duty as a carrier.[1] So a shipown-

to the control of her husband, and he alone can sue for an injury to or conversion of it. McCormick v. Railroad Co., 49 N. Y. 303. But it has also been held that, under the New York married woman's statute, a married woman may sue for an injury to or conversion of her paraphernalia. Rawson v. Railroad Co., 48 N. Y. 212.

[4] Perkins v. Wright, 37 Ind. 27. But it has also been held that a father may sue, in an action on the case, for loss of baggage carried on a journey by his minor son. Grant v. Newton, 1 E. D. Smith (N. Y.) 95

[5] Freeman v. Newton, 3 E. D. Smith (N. Y.) 246.

[6] Talcott v. Railroad Co., 66 Hun, 456, 21 N. Y. Supp. 318.

§ 645. [1] But where baggage has been injured during transportation, the owner, accepting and retaining the same, may bring his action against the carrier for damages for the tort or wrong by which the property was injured, but cannot recover, on a verified account, the entire value of the property so injured. Atchison, T. & S. F. R. Co. v. Wilkinson, 55 Kan. 83, 39 Pac. 1043.

er, who refuses to carry a passenger whom he has engaged to carry, and who proceeds on his voyage without giving the passenger a reasonable opportunity to remove his baggage, or with intent to carry it beyond his reach, thereby terminates the contract of carriage, and is liable in trespass for carrying it away, and the passenger need not sue for breach of contract.[2]

§ 646. PLEADING.

In an action for loss of baggage, a complaint which describes the baggage as "one trunk," containing "clothing and personal wearing apparel," is sufficient on demurrer.[1] So a complaint which states a contract on the part of a common carrier to convey a passenger and his trunks from one point to another, for a valuable consideration, and in the same count alleges an injury to the trunks, caused by defendant's negligence, is not demurrable as stating two causes of action,—one a breach of contract and the other a tort,—such statement constituting in fact but one cause of action.[2] But in an action for loss of baggage, where the complaint alleges that the contract was made with defendant for transportation to a certain point, plaintiff cannot recover on proof that the contract was made with another company, and that defendant was merely a connecting carrier.[3] Where an action is brought for the loss of

[2] Holmes v. Doane, 3 Gray (Mass.) 328.

§ 646. [1] Montgomery & E. Ry. Co. v. Culver, 75 Ala. 587.

[2] Rothschild v. Railway Co., 60 Hun, 582, 14 N. Y. Supp. 807, affirming 10 N. Y. Supp. 36.

[3] Montgomery & E. Ry. Co. v. Culver, 75 Ala. 587. A carrier's con-

a passenger's trunk, and afterwards the trunk is found and delivered to plaintiff, an amended petition for injury to the baggage and delay in its delivery sets up no new cause of action, and is properly allowed.[4]

§ 647. ADMISSIBILITY OF EVIDENCE.

It was an unbending rule at common law that a party or a person interested in the subject-matter of a lawsuit was not a competent witness. Some of the courts applied this rule in all its strictness in actions for loss

tract that, in case of loss, he will not pay more than a certain sum, merely limits the amount of his liability, and need not be averred in the declaration; but a contract exempting him from liability entirely, or from liability on goods which exceed a certain value, must be alleged in the declaration. And where the declaration in an action for loss of baggage proceeds on the common-law liability, and the plea sets up a special contract, limiting the carrier's liability to wearing apparel not exceeding $100 in value, a replication setting up gross negligence is a departure, and bad on demurrer. Shaw v. Railway Co., 5 Man. Rep. 198, 334.

[4] Lawrence v. Railroad Co., 61 Mo. App. 62. But a passenger who has sued a railroad company for loss of baggage is not bound to accept a tender of the baggage more than a year after it was delivered to the company, and after the company has answered denying the receipt of the property. Lake Shore & M. S. Ry. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724. A passenger advised a station agent of the fact that his trunk contained merchandise, and the agent charged an extra compensation for its transportation. An action was brought for the recovery of the baggage, and the court ruled that plaintiff could not recover for the merchandise, and a recovery was had only for the baggage. Held, that such judgment was not a bar to a subsequent action for the merchandise, as the two actions were not for parts of one entire indivisible demand, but were based on separate contracts. Millard v. Railroad Co., 86 N. Y. 441, affirming 20 Hun, 191.

of baggage, and plaintiff was held incompetent to prove the contents of his trunk, and their value, though he had no other evidence on the subject.[1] Other courts, from the necessity of the case, relaxed the rule, so as to permit plaintiff to testify to these matters where the baggage was lost through the carrier's fraud or unwarranted interference, but still held him incompetent where the baggage was lost through the carrier's negligence.[2] Other courts went yet further, and permitted plaintiff to testify to the contents of his trunk, not only where the carrier had committed spoliation of the property, but in all cases where no other evidence was attainable on the subject.[3] So the owner's wife was held competent to testify as to these matters whenever the owner himself might do so.[4] Of course, since parties are now competent witnesses by statute in all cases, this is now obsolete learning, but it may be remarked in passing that this is the only branch of legal learning on the subject of carriers of passengers that has become obsolete.

In an action for loss of a trunk which has passed

§ 647. [1] Dill v. Railroad Co., 7 Rich. Law (S. C.) 158; Smith v. Railroad Co., 60 N. C. 202.

[2] Snow v. Railway Co., 12 Metc. (Mass.) 44; Garvey v. Railroad Co., 1 Hilt. (N. Y.) 280.

[3] Dibble v. Brown, 12 Ga. 217; Johnson v. Stone, 11 Humph. (Tenn.) 419; Davis v. Railroad Co., 22 Ill. 278; Illinois Cent. R. Co. v. Taylor, 24 Ill. 323; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Mad River & L. E. R. Co. v. Fulton, 20 Ohio, 378; Romand v. McGill, 3 Pa. St. 451.

[4] Illinois Cent. R. Co. v. Taylor, 24 Ill. 323; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Mad River & L. E. R. Co. v. Fulton, 20 Ohio, 378.

through the hands of several steamboat carriers before it was delivered to defendant, evidence as to what was in the trunk when packed, several weeks before its delivery to defendant, is competent, although it can be held liable only for the contents of the trunk at the time of its receipt.[5] But in an action for the loss of baggage by a Swedish immigrant, plaintiff's testimony showing that the contents of his trunk were valuable does not render competent the testimony of an inspector of customs, who had examined the trunks of hundreds of Swedish immigrants, as to the highest value of the baggage he had ever seen in any of their trunks.[6]

§ 648. SAME—DECLARATIONS OF AGENT OR EMPLOYÉ.

We have seen that the general rule is that declarations or admissions made by an agent or employé are admissible against his principal only when they relate to a transaction in which the agent or employé had real or apparent authority to act for the principal, and only when they are made during that very transaction, and thus constitute a part of the res gestæ.[1] On this principle, it has been held that the acts and declarations of an agent in charge of a baggage room, with respect to a passenger's baggage, on application by the passenger for its delivery to him, are competent evidence for the passenger in an action against the com-

[5] Sugg v. Packet Co., 40 Mo. 443.

[6] Carlson v. Navigation Co., 109 N. Y. 359, 16 N. E. 546.

§ 648. [1] See ante, § 454.

pany for its loss.[2] So, where a passenger on a sleeping car places a valise in charge of the company's servants while she is asleep, their declarations, explanations, and suggestions, as to what had become of it, made the next morning, when the passenger inquired for it, are admissible against the company.[3]

§ 649. SAME—OPINION EVIDENCE.

Every one is presumed to know the value of articles in common use, such as wearing apparel and toilet articles; and, in an action for their loss, it is not necessary to call a dealer to prove the value of such things.[1] So, in an action for a month's delay in delivering baggage, plaintiff may state her opinion as to the value of the use of her clothes during the time of delay.[2] But a witness ought not to be permitted to state what

[2] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647; Curtis v. Railroad Co., 49 Barb. 148. But in an action for injuries to baggage, statements of the baggage men, if they do not constitute parts of the res gestæ, are not binding on the company. Atchison, T. & S. F. R. Co. v. Wilkinson, 55 Kan. 83, 39 Pac. 1043.

[3] Hampton v. Car Co., 42 Mo. App. 134. But in Bevis v. Railway Co., 26 Mo. App. 19, it was held that in an action for the theft of a passenger's clothing and jewelry while asleep in a sleeping car, the declarations of the porter the following morning, after being apprised of the theft, are not admissible against the company. Nor are the declarations of other passengers, that they also had been robbed, admissible in evidence. Such declarations are hearsay evidence merely.

§ 649. [1] Parmelee v. Raymond, 43 Ill. App. 609; Central R. v. Wolff, 74 Ga. 664.

[2] Gulf, C. & S. F. Ry. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303.

damages, in his opinion, plaintiff ought to recover for injury to or destruction of his baggage.[3]

§ 650. BURDEN OF PROOF, AND PRESUMPTIONS.

Since the carrier is liable as an insurer of the baggage, evidence that it was received by the carrier at the beginning of the journey, and that it was not delivered to the passenger at destination, or that it was delivered in an injured condition, makes out a prima facie case for plaintiff, and the burden rests on defendant to show that the baggage was lost or injured from some cause for which it is not responsible. The carrier cannot relieve itself from liability for loss of baggage by proof of its transportation to destination, but it must show either a delivery to the passenger, or a reasonable opportunity for him to get it.[1] But where a trunk is handled by draymen both at the beginning and ending of a passenger's journey, and is in apparently the same condition on delivery to the passenger at destination as when it left his house to be delivered to the railroad company for transportation, the railroad company will not be held liable for the loss of baggage contained in the trunk, unless it affirmatively appears that the trunk was not tampered with, either at the beginning or end of the passenger's journey, while not in its possession.[2]

Some difficult questions have arisen as to the right of a passenger to recover where he has been able to

[3] Atchison, T. & S. F. R. Co. v. Wilkinson, 55 Kan. 83, 39 Pac. 1043.

§ 650. [1] Matteson v. Railroad Co., 76 N. Y. 381.

[2] Ringwalt v. Railway Co., 45 Neb. 760, 64 N. W. 219.

prove merely that his baggage was delivered in a good condition to a railroad company for transportation over several connecting lines, and that the last carrier either failed to deliver it to him, or delivered it to him in an injured condition. The conclusion at which the courts have arrived is this: Where a passenger's journey is over several connecting lines of railroad, and he shows that his trunk was delivered to the first carrier in good condition, that it was checked through to his destination, and that the last carrier refused to deliver it, or delivered it rifled of its contents, the burden of proof is on the last carrier to show that it did not receive the trunk, or that the trunk was rifled of its contents when received by it.[3] In reaching this conclusion, the question with the courts has been, not what inferences are morally deducible from the facts, but on which side does sound public policy cast the burden of proof? "The burden of proof is the necessity of proof. In general, the evidence to sustain the allegation must be produced by the party making it; but when, from the

[3] Check v. Railroad Co., 2 Disney (Ohio) 237; Wolff v. Railroad Co., 68 Ga. 653; Lin v. Railroad Co., 10 Mo. App. 125. Where passenger baggage is checked, upon a coupon ticket, for a continuous passage over several connecting lines of railroad, and is delivered in a damaged condition, that company only is liable upon whose road the baggage is injured. The owner may, however, sue the company in whose custody he finds it damaged, and may recover without proving that the company received it uninjured, the original good condition being presumed to continue; but the presumption may be rebutted by proof on the part of the company that the property was damaged when received by it, in which case it is exonerated. Fox v. Railway Co., 16 Misc. Rep. 370, 38 N. Y. Supp. 88.

circumstances of the case, the other party can alone produce this evidence, there are many cases in which the law, to prevent a failure of justice, compels him to produce it; and it compels him to do this by making such slight circumstances against him as the party making the allegation may be able to show conclusive against him unless he does produce it." [4]

In strict conformity to this view, it has been held that no presumption arises against the first carrier from the failure of the last carrier to deliver a passenger's baggage at destination.[5] But this can be true only in those jurisdictions where the liability of the first carrier terminates with its own line. So a distinction has been made in Texas between a total loss of baggage and mere injury to baggage. Where goods are shipped over several lines, and they are found, upon arrival at destination, to be only damaged, the burden of proof is on the last carrier to show that it received the goods in such damaged condition. But where there is a total loss, and the goods do not arrive at their final destination, the receiving company would be held liable, unless

[4] Lin v. Railroad Co., 10 Mo. App. 125.

[5] Stimson v. Railroad Co., 98 Mass. 83; Montgomery & E. Ry. Co. v. Culver, 75 Ala. 587. Where a railroad company safely carries a passenger's luggage to its terminus, and the passenger directs one of the company's porters to transfer it to the station of another company, on which he intends to prosecute his journey, the first company cannot be held liable for the loss of the luggage on proof merely that the last seen of it was on a truck with other luggage which the porter had taken to the station of the connecting company. Such evidence is equally consistent with a loss by one company as by the other. Midland Ry. Co. v. Bromley, 17 C. B. 372.

there be proof that the goods were delivered to the next succeeding line.[6]

With respect to baggage in the possession of a railroad company as warehouseman, evidence that it failed to deliver the property to the owner when demanded prima facie establishes negligence and want of due care, and the onus of accounting for the default lies with the carrier.[7] A mere suggestion in the evidence that the goods were stolen does not cast on plaintiff the burden of proving negligence.[8]

§ 651. SAME—POSSESSION OF BAGGAGE CHECKS.

As railway companies have made their checks evidence in regard to the delivery of baggage to them, the possession of such a check is evidence against the company of the receipt of such baggage by it.[1]

On this ground, the rechecking of baggage by a connecting carrier has been an important element in some of the cases in fixing it with liability. The following is the rule adopted by the courts in this respect: Where a passenger delivers his baggage check to the agent of a

[6] International & G. N. R. Co. v. Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541.

[7] Burnell v. Railroad Co., 45 N. Y. 184.

[8] Williamson v. Railroad Co. (Super. N. Y.) 4 N. Y. Supp. 834.

§ 651. [1] Denver, S. P. & P. R. Co. v. Roberts, 6 Colo. 333; Dill v. Railroad Co., 7 Rich. Law (S. C.) 158; Davis v. Railroad Co., 10 How. Prac. (N. Y.) 330. "The primary purpose of giving a passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purposes mentioned." Isaacson v. Railroad Co., 94 N. Y. 278.

connecting railroad, and receives its check in exchange therefor, the presumption is, in the absence of proof to the contrary, that the baggage was received in due course by the latter company, and, in case of loss of the baggage, the burden rests on it to show that the baggage did not come into its possession.[2] Such rechecking of baggage by the connecting carrier has been held to be evidence, not only of the delivery of the baggage to it, but also that the baggage was in good order when received. This prima facie case can be overcome, as to the condition of the baggage, by proof that it was not in good order when so received, or by showing that it was in the same condition when so received as it was when delivered to the passenger at destination.[3]

§ 652. MEASURE OF DAMAGES—LOSS OF BAGGAGE.

The measure of damages for loss of baggage is the full value of the clothing for use to plaintiff at destina-

[2] Ahlbeck v. Railway Co., 39 Minn. 424, 40 N. W. 364; Davis v. Railroad Co., 22 Ill. 278; Atchison, T. & S. F. R. Co. v. Brewer, 20 Kan. 669; Kansas Pac. Ry. Co. v. Montelle, 10 Kan. 119. Where a railroad company receives a passenger's check, and gives its own check in exchange, though the baggage has not arrived over another road, the subsequent surrender by it of the passenger's first check to the other railroad company is sufficient to show that the baggage was received by the company so surrendering the check, in the absence of proof to the contrary. Chicago, R. I. & P. R. Co. v. Clayton, 78 Ill. 616. But in Candee v. Railroad Co., 21 Wis. 582, it was held that a connecting line is not liable for loss of baggage, unless the loss occurred on its line, and it is immaterial that it gave the passenger a check for the trunk, and took up the old check.

[3] St. Louis, A. & T. H. R. Co. v. Hawkins, 39 Ill. App. 406.

tion, and not merely what it would have sold for in money.[1] But the amount expended by plaintiff in the purchase of other clothing, because of the loss of her trunk, is not an element of damages.[2] So expenses incurred by plaintiff in endeavoring to rescue or find the property are too remote.[3] Nor are attorney's fees for bringing suit recoverable by plaintiff.[4]

For the wrongful act of a railroad company in taking

§ 652. [1] Fairfax v. Railroad Co., 73 N. Y. 167, affirming 43 N. Y. Super. Ct. 18; Simpson v. Railroad Co., 16 Misc. Rep. 613, 38 N. Y. Supp. 341; Lake Shore & M. S. Ry. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724; Parmelee v. Raymond, 43 Ill. App. 609. In Fairfax v. Railroad Co., supra, it was said: "The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little, if put into the market to be sold for secondhand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff, in such a case, the value of clothing thus ascertained. The rule must be the value of clothing for use by plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted, because such clothing cannot be said to have a market price, and it would not sell for what it was really worth." Ann. Code Miss. 1890, § 3569, authorizes double damages for careless or willful injury or loss of baggage.

[2] New Orleans, J. & G. N. R. Co. v. Moore, 40 Miss. 39.

[3] Spooner v. Railroad Co., 23 Mo. App. 403; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671. But in Morrison v. Railway Co., 15 N. B. 295, it was held that plaintiff is entitled to recover the value of lost baggage, and reasonable expenses of searching for it, but not for loss of time while so searching.

[4] New Orleans, J. & G. N. R. Co. v. Moore, 40 Miss. 39. A dentist whose instruments, contained in his valise, are lost while traveling, cannot recover for loss of profits or earnings which he might have made if the instruments had not been lost. Brock v. Gale, 14 Fla. 523. In an action for loss of a commercial traveler's samples, deposited by him in the cloak room of a railroad company, and held by it as warehouseman, the measure of damages is the actual value of the samples; and there can be no recovery for loss of salary, loss of

from a passenger parcels of groceries which, under his contract of carriage, he had no right to carry with him in the car, the measure of damages is the value of the groceries, and the railroad company is not liable in punitive damages where plaintiff himself provoked the difficulty, by asserting a right which he did not possess.[5]

§ 653. SAME—DELAY IN DELIVERY.

For delay in delivering baggage, the measure of damages is the value of the use of the property to plaintiff during the delay.[1] But the cost of new clothing purchased by the passenger because of the delay is not recoverable.[2]

profits, and expenses incident to the loss of the samples. Anderson v. Railroad Co., 4 Law T. (N. S.) 216.

[5] Delaware, L. & W. R. Co. v. Bullock (N. J. Sup.) 36 Atl. 773.

§ 653. [1] Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303.

[2] Texas & P. Ry. Co. v. Douglas (Tex. Civ. App.) 30 S. W. 487.

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